No. 87 1049

Supreme Court, U.S.
FILED
DEC 19 1987
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

AIR FLORIDA SYSTEM, INC.,
INTERFIRST BANK, DALLAS, N.A.,
Petitioners

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. When the District Court, in supervising a bankruptcy estate and liquidation of a national bank, plays a role in the negotiation, approval and interpretation of a contract, may the Court of Appeals disregard the District Court's findings and interpretation by using a *de novo* standard of review?

2. When a party to a civil action has induced the District Court to accept an evidentiary record, may the Court of Appeals conclude that the acceptance of evidence constituted error, and review the matter *de novo*?

PARTIES

The parties to this action are those listed in the caption. Petitioner InterFirst Bank Dallas, N.A. is the assignee of certain rights received from petitioner Air Florida System, Inc. arising in connection with this case. Corporate subsidiaries and affiliated corporations are numerous and therefore are set forth in Appendix C.

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Petitioners Air Florida System, Inc. and InterFirst Bank, Dallas, N.A. respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Amended Opinion of the Ninth Circuit reversing the judgment of the District Court is reported in 822 F.2d 833 (9th Cir. 1987); the Order and Amended Opinion appears as Appendix A. The District Court's Findings of Fact and Conclusions of Law, and Amended Judgment, appear as Appendix B.

JURISDICTION

Respondent invoked jurisdiction in the District Court under 28 U.S.C. § 1345 (federal agency as a plaintiff), 28 U.S.C. § 1348 (action to wind up affairs of a national bank), and 12 U.S.C. § 1819 (FDIC a party to a civil action). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1), this being an action in which a Court of Appeals has rendered a final judgment. On July 17, 1987 the United States Court of Appeals issued its Opinion. On July 31, 1987 a timely petition for rehearing was made. On September 22, 1987 the Court of Appeals amended its opinion and denied the petition for rehearing. This petition is filed within the ninety days allowed by 28 U.S.C.§ 2101.

STATUTES INVOLVED

This case involves 12 U.S.C. § 192 and Fed. R. Civ. P. 52(a), both of which are set forth in Appendix D.

STATEMENT OF THE CASE

I. INTRODUCTION

The decision of the Ninth Circuit Court of Appeals in this case invalidates court-approved sales, thereby threatening the integrity of the District Court. Whenever the District Court operates in a supervisory capacity — when it sits as a bankruptcy court, when it approves the sale of assets of a failed national bank, or whenever it participates in the negotiation and construction of contracts which can be consummated only with court approval — the District Court must have full authority to make and enforce decisions. Rather than upholding such authority, the decision below makes District Court supervisory deci-

sions reversible by *de novo* appellate review. Consequently, if the decision below stands, the involvement of the District Court in all such supervisory circumstances will be permanently compromised, and the ability of trustees, receivers or others to fulfill their obligations will be crippled.

The problem raised by the decision below needs review by this Court now. Over the last several years, this Court has clarified that there are certain areas in which the District Court is uniquely able to function, and which therefore are committed to that court's sound discretion. *See e.g., Anderson v. City of Bessemer City,* 470 U.S. 564 (1985); *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). This case raises another area of District Court expertise, in which its decisions must be accorded deference. In 1986, 477,000 petitioners filed bankruptcy, an increase of 31%.[1] In addition, in the last several years the number of bank failures has risen rapidly. The applicable statutory scheme requires court approval for disposition of the assets of a failed national bank, and the sound administration of bankruptcy estates constantly places District Courts in the role of approving sales of the assets of the estate. Where, as here, the District Court's role of approving sales of a failed bank's assets dovetails with the District Court's role of administering a bankruptcy estate, the District Court must have the power to make decisions which will be final.

Because the success of bank liquidations and bankruptcy administrations depends upon court approval of sales, the long-standing rule has been that such sales will not be upset on appeal absent fraud, mistake or excusable

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[1]See Annual Report of The Director of the Administrative Office of the Courts at 33 (1986).

neglect. The decision below jettisons that principle. Despite the absence of fraud, mistake or excusable neglect, seven years after a court-approved sale the Ninth Circuit reversed the judgment of the District Court interpreting a contract that same District Court had approved in the U.S. National Bank liquidation — the largest bank failure in U.S. history. Intertwined with the bank liquidation were five bankruptcy cases concerning Westgate-California Corporation, consolidated for administration before the same District Judge. Despite the supervisory and administrative character of the District Court's action, the Ninth Circuit made a *de novo* review of the contract language alone. The Ninth Circuit ruled that the District Court misinterpreted the contract for the sale of assets, even though the District Court's interpretation formed the very basis for its approval of the contract in the first place.

The Ninth Circuit result was even more surprising because the District Court interpreted the contract with the benefit of parol evidence urged upon it by respondent FDIC, which asserted that consideration of such evidence was necessary because the contract was ambiguous. The Ninth Circuit, however, rejected the characterization of the contract as ambiguous, and, using a *de novo* standard of review, interpreted the parties' intent as a question of law. Without showing any deference to the findings of the District Court, the Ninth Circuit also disagreed with the impact of the extrinsic evidence. The Ninth Circuit used its appoach in response to respondent FDIC's new argument contrived for appeal: having lost in the District Court with the benefit of the parol evidence which it insisted that the District Court consider, the FDIC argued that the Ninth Circuit should disregard this parol evidence, and thus ignore the record supporting the District Court's findings of fact. The Ninth Circuit did so.

If allowed to stand, the Ninth Circuit's decision will establish dangerous precedents: it will eliminate the required integrity of sales which are negotiated, reviewed, modified and approved by federal judges; and it will encourage parties to build an evidentiary record, then on appeal abandon the record and urge that the acceptance of the evidence constituted error. Inevitably, District Courts will lose their traditional authority, while bank liquidators and bankruptcy trustees will lose their ability to wind up the affairs of failed banks and bankruptcy estates.

II. The Factual Background

This case grows out of the collapse of San Diego financier C. Arnholt Smith's financial empire. In 1973 U.S. National Bank, controlled by Smith, failed. The Comptroller of the Currency appointed the Federal Deposit Insurance Corporation as receiver, whereupon the FDIC commenced liquidation proceedings before District Judge Leland C. Nielsen. Subsequently various entities under the name Westgate-California Corporation, also controlled by Smith, filed five actions for reorganization under Chapter X of the Bankruptcy Act. For various reasons, including the size and complexity of the case, the bankruptcy proceeding was administered by the United States District Court. The five actions were consolidated and Judge Nielsen presided over them as well. Smith's Westgate-California Corporation had been a shareholder and creditor of Smith's U.S. National Bank. Because U.S. National Bank in turn had loaned millions of dollars to Westgate, the FDIC as successor to U.S. National Bank became the largest claimholder against the Westgate estate.

By 1980, most of the Westgate estate's assets had been liquidated by the Court-appointed trustee and the only viable remaining operating asset was Air California, a successful regional airline. Following airline deregulation, Air Florida approached the FDIC about purchasing the FDIC's position in the Westgate estate. The FDIC's interest would become a dominant stockholder position in the anticipated "reorganization" of Westgate, and thereby give Air Florida, as purchaser, a West Coast presence.

In October 1980, the FDIC and Air Florida entered into an agreement for the sale of the FDIC's position, *subject to Judge Nielsen's approval.* The Court, however, rejected the initial agreement because it felt the price was too low, and ordered competitive bidding instead. On November 14, 1980 bidding took place in open court.

Ultimately, Air Florida was the successful bidder, as the Court found that Air Florida's bid was the highest and best offer. As approved by the Court, the agreement for sale required Air Florida to pay the FDIC $15,432,000 in cash, or approximately $18 per common share and $17.22 per preferred share.[2] At the time of the Agreement the only limited trading of Westgate common stock had taken place in the $9 per share range. The Agreement also provided for a general public offer for the remaining shares at the minimum price paid the FDIC. The Court required the parties to alter their initial agreement to read that this contemplated public offer was for the benefit of these minority tender offerees.

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[2]The total price was subject to later adjustment depending upon revenue received by Westgate from the anticipated sale of certain seafood processing assets.

The provisions for an offer to other shareholders were included in the Agreement not to provide additional compensation to the FDIC, but rather to protect the FDIC, and the bankruptcy trustee and estate, from lawsuits by the minority shareholders arising from sale of the FDIC's majority position. Under *Perlman v. Feldmann,* 219 F.2d 173, 178 (2d Cir.), *cert. denied,* 349 U.S. 952 (1955), and *Jones v. H.F. Ahmanson & Co.,* 1 Cal.3d 93, 117, 460 P.2d 464, 478, 81 Cal.Rptr. 592, 606 (1969), sale of a majority interest includes a premium for control of the company; the premium must be shared equally with all shareholders. Therefore, a general public offer for other shares at the minimum price paid the FDIC, as the Agreement provided, would protect the FDIC and the estate against lawsuits from the minority. Trial testimony disclosed that the word "minimum" in the Agreement denoted Air Florida's obligation to make the offer to minority interest holders at least at the same price paid to the FDIC, but reserved to Air Florida the right to make an offer at a higher price.

The Agreement did provide for contingencies under which the FDIC could receive additional compensation. Under applicable tax and accounting rules, a corporation which owned 80% of the stock of another corporation enjoyed certain economic benefits, including the ability to file consolidated tax returns. Under the Agreement, therefore, the FDIC could receive additional compensation if, but only if: (1) a general public offer was made at a price exceeding the price paid to the FDIC; and (2) Air Florida actually acquired 80% of the total interest in Westgate. At trial, the FDIC stipulated that it had no right to receive additional compensation unless both of these contingencies occurred.

After Air Florida had purchased the FDIC's shares with District Court approval, but before consummation of the Reorganization Plan, the Westgate trustee unexpectedly decided to sell Air California at auction to the highest bidder. The trustee did so, he stated in a 10-K report filed with the SEC, because he anticipated that such a sale would produce a greater return to the minority interest holders than an Air Florida tender offer at the same price paid to the FDIC. Neither the FDIC nor any other party objected to the sale on the basis that the trustee's understanding of the price at which Air Florida had committed to make the tender offer was erroneous.

Again, Judge Nielsen supervised bidding on the asset. Ultimately he approved the sale of Air California to an independent entity for the surprisingly large sum of $61.5 million. Air Florida participated in the auction, but this time was outbid.

With the sale of its only operating asset, Westgate became essentially a bundle of cash. Therefore, common stock interests in Westgate became easy to value and began to trade, opening at $21 per share but never going below that point or anywhere near the $18 per share price paid to the FDIC. Since Westgate had no operating entity left, the trustee decided to liquidate rather than reorganize and issue stock, and paid a liquidating dividend of $28.25 per share. Thus, minority shareholders received not only as much as the FDIC had from Air Florida, but more.

Since at all times after the unexpected sale of Air California minority shareholders could have received, and did receive, more for their shares than the FDIC, Air Florida did not make a general public offer at the minimum price referred to in the Agreement. It would have been idle, and perhaps misleading, for Air Florida to have

done so. As a result of the unusually successful sale price of Air California, the FDIC and the trustee were protected against lawsuits from the minority because the minority received more than it would have from an Air Florida tender offer at the price paid to the FDIC.

The FDIC, too, profited from the deal. Originally burdened with a majority stake in a bankrupt company, and faced with an obligation to liquidate its position because it was a receiver of a national bank, the FDIC received double the value of its interest at the time it began negotiations with Air Florida, received its money in cash, and received its cash a full year and a half before the sale of Air California (and without any risk of decline in Air California's value) — before the minority shareholders received anything. Without the transaction as approved by the District Court, in which the FDIC received $18 per share, the FDIC would have continued to hold an interest it had been willing to sell for $10 per share.

Without the transaction as approved by the District Court, the minority shareholders too would have remained just that: minority shareholders, in a reorganized company with an uncertain future. Instead, the District Court's supervision and approval of the FDIC/Air Florida transaction set in motion the events which led to the sale of Air California and the liquidation of Westgate. The result was dramatic, if not unprecedented: the minority shareholders recovered all their money. None of this would have happened had not the District Court, in its supervisory capacity, approved the contract on specific terms.

As liquidation of Westgate commenced, therefore, it appeared that everyone had benefitted from the Air Florida transaction. Soon, however, the FDIC would take

action in an effort to unwind the transaction and to demand even more for itself.

III. The Proceedings Below

In 1982, nearly two years after Judge Nielsen had approved the Air Florida/FDIC Sale, the FDIC sued Air Florida for recission of the Agreement. Later it amended its complaint also to assert fraud. The FDIC's complaint charged that Air Florida had materially breached the Agreement by not making a tender offer. Although not entitled to additional compensation because the contingencies for such compensation had not arisen, the FDIC experienced "seller's remorse" that it sold its interest, then, through unforeseen circumstances, the minority shareholders ultimately received a higher price for their interests than had the FDIC. Judge Nielsen tried the FDIC's lawsuit. In presiding over the bank liquidation and sitting as the Bankruptcy Court in the Westgate proceeding, it was he who had substantively addressed the issue of the public offer requirement, and then had reviewed and approved the terms of the contract.

At trial, fifteen witnesses testified, orally or through deposition, and 69 exhibits were received. In large part this occurred because the FDIC urged that the contract was ambiguous, stating: "It is apparent that the tender offer provision is ambiguous, and that the contract is reasonably susceptible to the interpretation advanced by the FDIC. Accordingly, parol evidence should be admitted to assist the Court in ascertaining the intent of the parties." (FDIC Trial Brief, 16:17-21). In response, Judge Nielsen received and considered parol evidence but ruled against the FDIC and in Air Florida's favor. Judge Nielsen found that Air Florida made a commitment to make a general public offer at the minimum price paid to

the FDIC, but was relieved from doing so given that minority interest holders always could have received and did receive more than the minimum price. He also specifically found that the FDIC sustained no damage by Air Florida's failure to make the general public offer; that Air Florida did not promise to cause either of the two contingencies to occur, both of which were necessary for the FDIC to receive additional compensation under the Agreement; that there was no material failure of consideration; and that the extrinsic evidence confirmed the Court's interpretation of the Agreement. Judge Nielsen also ruled that Air Florida did not commit fraud, a ruling which the FDIC did not appeal.

Thirteen months after oral argument on appeal — and nearly seven years after the sale had been confirmed — the Court of Appeals for the Ninth Circuit reversed. Despite the fact that at trial extrinsic evidence had been received at the insistence not of Air Florida but of the FDIC, the Court of Appeals adopted the FDIC's new and different argument, contrived for appeal, that the Court need look only at the written instrument itself. In an opinion dated July 17, 1987, the Ninth Circuit disagreed with the findings of Judge Nielsen, who had both approved and interpreted the contract, ruling instead that the intent of the parties was for Air Florida to make a tender offer for the remaining shares of Westgate, no matter what price was necessary to acquire them. The Court of Appeals did not rule that Judge Nielsen had been clearly erroneous, but instead ruled that he had misread the contract he himself had supervised and approved. The Ninth Circuit directed that the District Court either order the transaction rescinded, or direct Air Florida to pay damages.

Following Air Florida's Petition for Rehearing, in which Air Florida argued that the District Court's findings deserved deference under Fed. R. Civ. P. 52(a), the Court of Appeals amended its opinion. Notwithstanding that the FDIC had asserted at trial that the contract was ambiguous, the appellate court inserted a footnote stating that the contract was unambiguous, and that therefore the Court reviewed the matter *de novo*. See Appendix A-5. It changed the opinion from "[the extrinsic evidence] does not support Air Florida's interpretation" to "[the extrinsic evidence] does nothing to contradict the plain meaning of the agreement or render it ambiguous." *Id.* After so amending its opinion, the Court of Appeals declined to grant a rehearing, and rejected a suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Prevents Parties From Relying On Contracts Approved by District Courts, Thereby Threatening The Core of the District Court's Supervisory Function

A. The Decision Jeopardizes Court-Approved Sales.

If the decision is allowed to stand, important contracts for sale reviewed, modified and approved by the District Court will have no degree of certainty or finality — a result which will eliminate such sales in the future, wreaking havoc on bank liquidations and court-supervised bankruptcy proceedings. Moreover, the decision will have nullified a statutory requirement that Court approval be obtained before assets of a failed national bank can be sold.

1. Liquidation of National Banks

The National Bank Acts provide in pertinent part as follows:

> [A] receiver [of a national banking association] under the direction of the comptroller shall take possession of the books, records and assets of every description of such association, collect all debts, dues, and claims belonging to it, and *upon the order of a court of record of competent jurisdiction,* may sell or compound all bad or doubtful debts and, on a like order, *may sell all the real and personal property of such association, on such terms as the court shall direct.*
>
> 12 U.S.C. § 192 (West Supp. 1987) (emphasis added).

This statute originated in the National Bank Act, which established the Office of the Comptroller of the Currency, and authorized the Comptroller to appoint receivers to take charge of insolvent banks. The requirement of court approval before a receiver may liquidate assets is designed to provide a check on the receiver by insuring that he obtains the highest amount for sale of the assets. *Griggs v. Baumer,* 130 F.2d 899, 901 (3d Cir. 1942), quoting *Fox v. Young,* 145 Pa. Super. 111, 113, 20 A.2d 835, 836 (1941); *Roth v. Hood,* 106 F.2d 616, 618 (6th Cir. 1939).[3]

The Congressional requirement of Court approval, however, becomes meaningless if the receiver's interpretation of the contract of sale overrides the Court's interpretation. If the receiver's interpretation of "such terms as the

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[3]Since passage of the National Bank Act, Congress has enacted the Federal Deposit Insurance Act, codified in 12 U.S.C. § 1811 *et seq.* Under that statute, the Comptroller is required to name the FDIC as the receiver of banks he declares insolvent. 12 U.S.C. § 1821(c).

court shall direct" stands paramount, then the receiver, not the Court, effectively has given approval. Yet Congress clearly placed that obligation on the Court: the lower courts make clear that a sale cannot occur without court approval (*Baumer, supra,* 130 F.2d at 902; *Hood, supra,* 106 F.2d at 617; *Edson Realty Co. v. Commercial National Bank,* 29 F.Supp. 22, 27 (D. La. 1939)), and once approved, a sale cannot be set aside unless fraudulent (*In Re Conservatorship of Wellsville National Bank,* 407 F.2d 223, 228 (3d Cir.), *cert. denied sub nom Miller v. Camp,* 396 U.S. 832 (1969); *Michelsen v. Penney,* 135 F.2d 409, 431 n. 9 (2d Cir. 1943); *Baumer, supra; Edson, supra).*

Court approval of a receiver's decision to sell assets does not constitute judicial action in the usual sense of the word. Rather, it constitutes administrative action, whereby the approving court becomes a "superior and advisory agent in the administrative field." *Roth v. Hood,* 106 F.2d 616, 618 (6th Cir. 1939). Accordingly, the approving court must have broad discretion "in fixing the terms and conditions of sales," and the Court's decision will not be upset absent abuse of discretion. *Id.* Overriding the interpretation of the approving Court as to the terms of the sale — especially on *de novo* review — simply takes away the protection Congress enacted.

This case illustrates the reason Congress required Court approval. The receiver struck a deal for sale of the bank's assets at a price of $10 per share. Because Court approval was required, however, the receiver was not allowed to consummate that deal. The requirement of court approval produced an increase in the price to $18 per share, thereby protecting the shareholders and creditors of the failed bank.

Here, as always, the terms of the transaction were integral to the Court's decision to approve it. The District

Court could not have approved it without an understanding of those terms. If an appellate court can second-guess the District Court's understanding of the terms, then it can second-guess the decision to approve, and prevent the sale from being a final sale upon which parties can rely. Yet lower courts which have addressed the issue have ruled emphatically that parties *can* rely on Court approval. As stated in *Griggs v. Baumer, supra:*

> *Once . . . an order [confirming a sale] is signed, the purchaser named therein is entitled to rely upon it, and the court cannot, in the absence of fraud or mistake,* rescind that order, even for the laudable purpose of securing for the creditors and stockholders of the bank a substantial increase in the price of the assets sold.
>
> 130 F.2d at 902 (emphasis added).

If the appellate courts are free to re-examine the contract of sale and on *de novo* review reach their own conclusion as to its meaning, parties will be left with uncertainty, and will not participate in sales.

This case illustrates the dangers. Respondent FDIC deliberately availed itself of Court approval for the sale of its interests in Westgate. The contractual agreement was modified in several respects in response to the Court's concerns. Then all parties relied on the Court's approval of the Agreement: Air Florida, by borrowing $17 million; Air Florida's bank, by financing the sale; the FDIC, by selling its interest free from the likelihood of lawsuits; and the Westgate trustee by determining that, since Air Florida was obligated to make a tender offer only at the minimum price, he should sell Air California and thereby obtain a greater benefit for the estate. Had the parties known that the Ninth Circuit, 6½ years after the fact,

based solely on its own reading of the contract without knowing the circumstances behind the District Court's approval of the sale in the first place, would conduct an out-of-context review, none would have relied on approval in the first place.

Accordingly, the District Court's interpretation of the contract he approved must receive deference, unless the District Judge has abused his discretion or has been clearly erroneous in his interpretation. That becomes even more apparent when, as here, the District Court is charged with supervising a related bankruptcy estate as well.

2. Bankruptcy Sales

It has long been recognized that court-approved bankruptcy sales must be final — otherwise, parties have no reason to participate in them. As explained in *In Re Chung King, Inc.,* 753 F.2d 547, 550, 554 (7th Cir. 1985):

> "[I]f parties are to be encouraged to bid at judicial sales there must be stability in such sales and a time must come when a fair bid is accepted and the proceedings are ended." *In re Webcor,* 392 F.2d at 899.
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> * * *
>
> ... [I]f every error in the judicial sale process causing some inequity allowed the setting aside of confirmed sales, the principle of finality of judicial sales would be seriously undermined.... Parties must be encouraged to make their highest bids at judicial sales. [Citation omitted.] In the long run this policy benefits creditors as well as the bankruptcy estate by ensuring that the highest bids always are made in a timely fashion and are properly considered by the bankruptcy court.

See also, In Re Transcontinental Energy Corp., 683 F.2d 326, 328 (9th Cir. 1982); *In Re CADA Investments, Inc.*, 664 F.2d 1158, 1161-62 (9th Cir. 1981); *In Re Webcor, Inc.*, 392 F.2d 893, 899 (7th Cir.), *cert. denied sub nom Silver, Inc. v. Webcor*, 393 U.S. 837 (1968); 1 Collier BANKRUPTCY MANUAL, ¶ 3.03[8] (3d ed. 1987).

To ensure that a time will come "when a fair bid is accepted and the proceedings are ended", the Bankruptcy Code prescribes a limited period of time within which appeal may be taken from an order confirming a sale (*see* 11 U.S.C. § 158(c) (West Supp. 1987); Bankr. Rule 8002); and specifies that unless a bankruptcy court-confirmed sale is stayed, a bona fide purchaser shall not be affected by the reversal or modification of the order on appeal, whether or not the purchaser knows of the pendency of the appeal (11 U.S.C. § 363 (m) (West Supp. 1987); *see also* Bankr. Rule 805). Moreover, under Bankruptcy Rule 9024, final sales cannot be vacated absent compelling circumstances such as fraud or mistake and this rule cannot be circumvented by collateral attack (*see Lindsey v. Ipock*, 732 F.2d 619, 622 (8th Cir.), *cert. denied sub nom Cryts v. French*, 469 U.S. 881 (1984); *In Re Matter of Garfinkle*, 672 F.2d 1340, 1348 (11th Cir. 1982); *Slocum v. Edwards*, 168 F.2d 627, 631 (2d Cir. 1948)).

The standards in the present code and rules are similar to provisions of the prior Bankruptcy Act and Rules. *See In Re Whitney-Forbes Inc.*, 770 F.2d 692, 696-97 (7th Cir. 1985) (discussing former Bankr. R. 924 and case law thereunder); *In Re Suchy*, 786 F.2d 900, 901-02 (9th Cir. 1985) (discussing former Bankr. R. 805); *In Re Vetter Corp.*, 724 F.2d 52, 54-55 (9th Cir. 1983) (discussing former Bankr. R. 805 and 11 U.S.C. § 363(m)). All share a commitment to the efficient operation of the bankruptcy system. This Court too has noted Congress' support for

the authority of the bankruptcy system to function promptly and effectively. *E.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

Indeed, if the finality of court-approved bankruptcy sales is not protected, those who did choose to participate in such sales would run the risk of suffering serious prejudice — by having transactions in which they had invested substantial sums vacated years after the fact, quite possibly solely ~~because, as~~ here, the sellers had become dissatisfied with the deals. Not surprisingly, this Court and others have stated that sales on which persons have relied should not be set aside. *See, e.g., Wayne United Gas Co. v. Owens-Illinois Gas Co.*, 300 U.S. 131, 137 (1937); *In Re Whitney-Forbes, supra*, 770 F.2d at 697-98.

In the scheme of protecting confirmed sales, Bankruptcy Court judges play a critical role. They not only supervise transactions; they virtually become a party to the deal. The Bankruptcy Judge knows what the transactions encompass, whose rights will be affected, and how they will be affected. The Bankruptcy Judge evaluates and approves the transactions in order to protect the estate, the creditors, and the debtors. As one commentator has noted:

> Since a bankruptcy sale is a judicial sale, one of the parties thereto is the bankruptcy court itself. Although title vests in the trustee, not in the court, and although the trustee acts as a formal party and as an instrumentality of the court, the true vendor is the court. [Footnote omitted.] This characteristic feature of a judicial sale accounts for certain peculiarities and deviations from an ordinary sale, governed by the familiar rules of offer and acceptance.
>
> 4B COLLIER ON BANKRUPTCY ¶ 70.98[16] (14th ed. 1978).

A Bankruptcy Court judge cannot perform his function of protecting the finality of orders if his decisions can be second-guessed on *de novo* review by the Court of Appeals. Such second-guessing leads to all the harms which the bankruptcy statutes and decisions are designed to avoid: the discouragement of participation in bankruptcy sales, the creation of prejudice by the unwinding of transactions years after the fact, and the frustration of the Congressional intent to allow for quick and efficient bankruptcy reorganizations and liquidations.

If it is to have any force, the principle that court-approved sales will not be disturbed must prohibit collateral attacks which have the effect of rewriting the sales contract. Damages based on a different reading of the sales contract than that which the Court adopted have the same effect as an order of recission. They create the same prejudice and discourage participation in sales. They are as much an unwinding of the transaction as is an order of rescission.

The Ninth Circuit's opinion below sanctions appellate second-guessing. Certiorari thus should be granted in this case — for only in this manner can the integrity of the bankruptcy system be upheld.

B. The Decision Threatens The Authority Of the District Court to Operate in Any Supervisory Capacity.

The precedent established by the decision below extends beyond the immediate context of this case, undermining all situations in which the District Court functions in a supervisory capacity. This includes, for example, federal equity receiverships, often used in securities

cases, where the Court appoints a receiver to operate a company in trouble. *See* 12 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2981 (1973). As in the bankruptcy context, the receiver operates as an arm of the court, and the District Court must evaluate and approve contracts. As in the bankruptcy context, the appellate court must review the District Court's decisions on such contracts. Yet the cases demonstrate that, in order to protect the ability of the District Court to exercise its supervisory powers, appellate courts will not upset the District Court's determinations except for an abuse of discretion.

The *per curiam* opinion in *Securities and Exchange Commission v. Arkansas Loan & Thrift Corp.*, 427 F.2d 1171 (8th Cir. 1980) makes this point directly. There the District Court, supervising a receiver, interpreted the terms of a fidelity bond. When the appellant challenged the interpretation, the Court of Appeals upheld the District Court because the court had not abused its discretion:

> Any action by a trial court in supervising an equity receiver is committed to his sound discretion and will not be disturbed unless there is a clear showing of abuse. [Citations omitted.] Under this rule, we need not pass on the merits of the trial court's interpretation of the bond beyond a finding that there has been no abuse of discretion. We have reviewed the record in this case and find no abuse of discretion in the approval of the receiver's settlement.
>
> *Id.* at 1172.

A panel of the Ninth Circuit also recently has held that in reviewing decisions of the District Court involving supervision of a receivership, the standard is abuse of

discretion. *Securities and Exchange Commission v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). In language applicable here, the court ruled:

> "[T]his court should not place itself in the position of second guessing a district court judge who had an opportunity to acquire substantial knowledge of the facts and to evaluate the various legal positions after hearing their merits put forth by the various parties, particularly when there appears to be no clear abuse of discretion."
>
> *Id.* at 1037, quoting *SEC v. Lincoln Thrift Assn.*, 577 F.2d 600, 609 (9th Cir. 1978).

Cf. Hudson v. Grand Deposit Mining Co., 458 F.2d 1202, 1205 (9th Cir. 1972). The decisions of these lower courts uphold the District Court's authority because otherwise District Courts cannot supervise. If their decisions are to be second-guessed, the receivership, like the bankruptcy trusteeship, would not be able to perform its functions.

The decisions of these lower courts mandate deference to a District Court's interpretation of a contract approved in a supervisory capacity. One reason reinforcing the need for such deference is that the intent of the parties may be at issue and, as this Court has ruled in several contexts, intent is a *factual* matter:

> Treating issues of intent as factual matters for the trier of fact is commonplace. In *Dayton Board of Education v. Brinkman*, 443 U. S. 526, 534 (1979), the principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. We recognized that issue as essentially factual, subject to the clearly-erroneous rule. In *Commissioner v. Duberstein*, 363 U. S. 278 (1960), the Court held that

> the principal criterion for identifying a gift under the applicable provision of the Internal Revenue Code was the intent or motive of the donor — "one that inquires what the basic reason for his conduct was in fact." *Id.*, at 286. Resolution of that issue determined the ultimate issue of whether a gift had been made. Both issues were held to be questions of fact subject to the clearly-erroneous rule. In *United States v. Yellow Cab Co.*, 338 U. S. 338, 341 (1949), an anti-trust case, the Court referred to "[f]indings as to the design, motive, and intent with which men act" as peculiarly factual issues for the trier of fact and therefore subject to appellate review under Rule 52.
>
> *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (holding that intent to discriminate is issue of fact).

Contractual intent, especially for contracts approved by a supervising court, is no different. Like all factual matters, it is for the District Court to decide, subject to reversal only if clearly erroneous under Fed. R. Civ. P. 52(a). In *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), this Court explicated the clearly erroneous standard. The rationale for the standard was stated as follows:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal

> have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event'... rather than a tryout on the road."
>
> *Id.* at 574-75.

This applies with special force to contracts approved by a supervising court.[4]

Again, this case illustrates the danger. Based on the parties' stipulation at trial, on other evidence, and on the District Court's intimate familiarity with the context in which the contract had been approved, the District Court found as a fact that the parties had not intended that the public offer commitment provide additional compensation to the FDIC:

> The FDIC bargained for and received under the Agreement an option to obtain an equivalent amount of consideration which Air Florida paid to other shareholders pursuant to its general public offering only if both of two contingencies occured .... The FDIC neither bargained for nor received any undertaking on the part of Air Florida to cause either of such contingencies to occur, and the Agreement imposed no duty on Air Florida to either offer a price

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[4]Adoption of the appellate decision in this case makes every contract decision reviewable *de novo*, thereby making trial meaningless. The importance of the issue cannot be overstated. Contract cases represent nearly 35% of all civil actions. Annual Report of the Director of the Administrative Office of the United States Courts at 175 (1986).

> higher than that payable to the FDIC or to attempt to acquire 80% or more of the common stock of reorganized Westgate.
>
> Finding of Fact No. 11.

The Court of Appeals, however, ruled just the opposite:

> Air Florida's promise to make a tender offer served as partial consideration. The FDIC took the risk that it would get nothing more if the price of Westgate shares declined or remained the same, but it contracted for additional compensation if the price went up.
>
> Order and Amended Opinion at 12.[5]

If the Court of Appeals was not satisfied with the District Court's findings on intent, it at least could have remanded for further findings on that issue. This court has stated that to be the preferred course. *Pullman-*

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[5]The first portion of the paragraph from which the quotation comes graphically shows the dangers of appellate fact-finding:

> Furthermore, the bargain price that Air Florida paid the FDIC for the Westgate stock supports the conclusion that the parties contemplated that the tender offer price might be higher than the price paid to the FDIC. Air Florida agreed to pay $15.4 million for stock with an estimated value in excess of $17 million.
>
> *Id.*

To petitioners' knowledge, this is a fact not to be found in the record. On the Petition for Rehearing, petitioners brought to the attention of the Court of Appeals the fact that the price had been set by competitive bidding, which assured that the price paid was the highest price *anyone* would pay — surely the best indication of the estimated value. Petitioners do not know the evidence upon which the Court of Appeals found that the stock Air Florida was purchasing had an estimated value of $17 million, or that Air Florida paid a bargain price.

Standard v. Swint, supra, 456 U.S. at 291-92. Instead, the Court of Appeals showed *no* deference to the trial court, and left the trial court with no fact-finding function, and no power to effectively operate in a supervisory capacity.

II. The Decision Below Encourages Parties to Abandon Evidentiary Records They Themselves Have Created, By Urging Reversal Based On Error They Invited.

Certiorari also should be granted to insure that an appellant not be allowed to build an evidentiary record, lose the case, then urge admission of the evidence as reversible error. To allow a party strategically to abandon a record which it specifically created offends traditional notions of fairness and makes a mockery of trial court proceedings. Yet, this is precisely what the Ninth Circuit did. It allowed the FDIC to urge at trial that the contract was ambiguous, then abandon the record which supported the trial court's findings against the FDIC — on the grounds that the contract was *not* ambiguous.

The Ninth Circuit's ruling in this case conflicts with decisions of this Court, every circuit of the Court of Appeals, and at least one panel of its own circuit, all of which hold that an appellant may not take advantage of its own invited error. It directly conflicts with *Computer Systems Engineering Inc. v. Qantel Corp.*, 740 F.2d 59 (1st Cir. 1984). There the appellant had urged that the trial court accept parol evidence and that the trier of fact interpret the contract based on that evidence. On appeal, the appellant then reversed its position, arguing that it was error for the jury to have interpreted the contract. The First Circuit rejected this argument:

> Qantel requested the court to instruct the jury that it was for them to interpret disputed contract language

> and that in interpreting such language, "the intent of the parties may be determined by their acts and express understandings, particularly where they have acted under the contract for a period of time." . . . Qantel was required, at the very least, not to "invite error" by requesting jury instructions based on a statement of law it would subsequently seek to make a basis for reversal on appeal.
>
> *Id.* at 64.

See also, Law v. United States, 266 U.S. 494, 496 (1925); *Maxwell Land-Grant Co. v. Dawson*, 151 U.S. 586, 606 (1894); *Schools v. Risley*, 77 U.S. 91, 114 (1870); *Director General of the India Supply Mission v. S.S.Maru*, 459 F.2d 1370, 1377 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973); *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975); *Havee v. Belk*, 775 F.2d 1209, 1216-17 (4th Cir. 1985); *First National Bank v. Small Business Administration*, 429 F.2d 280, 284 (5th Cir. 1970); *Garza v. Indiana & Michigan Electric Co.*, 338 F.2d 623, 624-25 (6th Cir. 1964); *Weise v. United States*, 724 F.2d 587, 590-91 (7th Cir. 1984); *Mach v. Abbott Co.*, 136 F.2d 7, 10 (8th Cir.), *cert. denied*, 320 U.S. 773 (1943); *Deland v. Old Republic Life Insurance Co.*, 758 F.2d 1331, 1336-37 (9th Cir. 1985); *Gundy v. United States*, 728 F.2d 484, 488 (10th Cir. 1984); *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 n. 4 (llth Cir. 1985); *Sector Refining, Inc. v. Enterprise Refining Co.*, 771 F.2d 496, 504-05 (Em.App. 1985); *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 380 F.2d 605, 609 (D.C. Cir.), *cert. denied*, 389 U.S. 928 (1967).

This Court's review of the Ninth Circuit's decision in this case is needed to establish that, except in extraordinary circumstances, Courts of Appeals may not re-weigh evidence or challenge conclusions of law where the appel-

lant has invited the error. Otherwise, the Ninth Circuit, and the judicial system as a whole, will be left with precedent for allowing a party to create a record, see if he likes it, and then, if he does not, abandon it on appeal. Surely, such a result does not forward the principles of fairness and economy which are essential to proper functioning of the federal judicial system.

CONCLUSION

Viewed from many perspectives, the decision below emasculates District Court authority. It vitiates the requirement that assets of a failed bank cannot be sold without the approval of the Court *on such terms as the Court shall direct.* It invades traditional District Court areas — supervision of trusteeships and District Court finding of facts. It authorizes reversal of District Court decisions even when those decisions are made in reliance on error invited by the appellant. Unless corrected by this Court, it sends a dangerous instruction to the District Courts that their authority has been taken away. These reasons amply justify a grant of certiorari.

Dated: December 19, 1987.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
as a receiver of United States National Bank,
Plaintiff-Appellant,

vs.

AIR FLORIDA SYSTEM, INC.,
a Delaware Corporation,
Defendant-Appellee.

No. 84-6280

D.C. No. CV-82-0525-LCN

AIR FLORIDA SYSTEM, INC.,
Counter-Claimant,

vs.

FEDERAL DEPOSIT INSURANCE CORP.,
Counter-Defendant.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as a receiver of United States National Bank,
Plaintiff-Appellant,

vs.

AIR FLORIDA SYSTEM, INC.,
a Delaware Corporation, et al.,
Defendants-Appellees.

No. 85-6327

D.C. No. CV-82-0525-LCN

ORDER AND AMENDED OPINION

Argued and Submitted
June 5, 1986 — Pasadena, California

Filed July 17, 1987
Amended September 22, 1987

Before: Alfred T. Goodwin, Thomas Tang and Betty B. Fletcher, Circuit Judges.

Per Curiam

Appeal from the United States District Court for the Southern District of California
Leland C. Nielsen, District Judge, Presiding

SUMMARY

CONTRACTS

Appeal from a judgment refusing to rescind a contract and enforcing an arbitration award. Reversed in part, vacated in part, and remanded.

Appellant Federal Deposit Insurance Corporation (FDIC) became a major creditor of the Westgate-California Corporation (Westgate), and was entitled to Westgate stock once a bankruptcy reorganization was complete. The FDIC sold its Westgate interests to Air Florida System, Inc. (Air Florida) for $15.4 million, and an agreement to make a general public offer for outstanding Westgate common shares at no less than the price paid the FDIC. Air Florida purchased the stock in Westgate to acquire its subsidiary, Air California, but this property had already been sold to a third party at a price which increased the value of Westgate common stock. Air Florida informed the FDIC it had decided not to make a tender offer, and Westgate was liquidated by its directors. The FDIC brought suit against Air Florida seeking rescission and restitution because Air Florida had failed to make the tender offer. Air Florida denied it had a duty to make the offer at a price exceeding the price paid to the FDIC and argued that the rise in Westgate's market price

excused its tender offer obligation. Air Florida counterclaimed for $2 million it alleged was owing under a provision in the contract requiring adjustment of the purchase price of the stock on sale of a cannery owned by Westgate. After a bench trial, the court held that Air Florida had not breached its agreement with the FDIC, and that the agreement (including the cannery adjustment provision) remained in effect. The court left the amount of the adjustment open for arbitration, where a $1.5 million adjustment in favor of Air Florida was ordered. The court entered the arbitration award.

[1] A straightforward reading of the agreement between the parties requires a finding that Air Florida had a duty to make a tender offer. [2] When it concluded that Air Florida's duty was limited to a tender offer at the minimum price, the court misread the agreement. A tender offer is made in aid of a bona fide attempt to acquire control of a company. An offer of only the minimum price, in the face of a higher market price, would not be a bona fide tender offer. [3] The bargain price Air Florida paid the FDIC for the stock supports the conclusion that the parties contemplated that the tender offer price might be higher than the price paid the FDIC. [4] The plain language of the agreement imposed a duty on Air Florida to make a tender offer at a price reasonably calculated to obtain outstanding shares of Westgate. [5] Even assuming that certain extrinsic Air Florida evidence is admissible because it is relevant to prove a meaning to which the language of the agreement is reasonably susceptible, the evidence does not support Air Florida's interpretation, [6] as nothing in the proffered extrinsic evidence contradicts the plain meaning of the agreement. [7] Air Florida's refusal to perform its tender-offer obligation constitutes a failure of consideration, but a partial failure of consideration justifies rescission only if the failure is material or goes to the essence of the contract.

[8] Because a breach was found, the case is remanded to the district court to determine whether the breach was material. [9] If the breach was material, the FDIC is entitled to rescind. [10] If the court determines that the agreement cannot be rescinded, it may grant any party any other relief to which he may be entitled under the circumstances.

[11] If the court determines that the FDIC can rescind the agreement, the FDIC is relieved of its obligation to make further payments pursuant to the cannery adjustment and the legality of the arbitration procedures will be moot. If Air Florida's breach is not material the FDIC's obligation to provide additional consideration pursuant to the cannery adjustment would be excused only if that obligation was dependent upon Air Florida's obligation to make a tender offer. California courts indulge a strong presumption against construing contractual obligations as dependent. [12] If the agreement is not rescinded, FDIC's obligation to compensate Air Florida for the cannery adjustment has not been discharged. [13] The arbitration award will not be vacated due to the arbitrator's refusal to hold an oral hearing on the issue of contractual intent. [14] The arbitration award vested on the date of the arbitrator's decision, and was not delayed by an agreement to keep the district court proceeding open until the court was able to enter a single final judgment.

COUNSEL

David L. Sandborg and Elliot L. Bien, San Francisco, California, for the plaintiff-appellant.

Ralph Zarefsky, Los Angeles, California, and Patrick C. Shea, San Diego, California, for the defendants-appellees.

ORDER

The opinion filed July 17, 1987 is amended as follows:

On page 7 (slip op.) add new footnote 2 to the heading "1. *The Tender Offer.*" ("1. *The Tender Offer.*[2]") Text of the footnote shall read: "The meaning of a contractual term and the determination whether such a term is ambiguous are both questions of law subject to de novo review. *United States v City of Twin Falls,* 806 F.2d 862, 869 (9th Cir. 1986). If ambiguity exists and the district court makes factual findings as to the parties' intent, the court's findings will not be disturbed unless clearly erroneous. *Id.* Here, because we find no ambiguity, *see infra* at __, our review is de novo." Renumber subsequent footnotes accordingly.

At page 12, delete "not support Air Florida's interpretation." from the end of the first full paragraph and insert "nothing to contradict the plain meaning of the agreement or render it ambiguous."

On page 20 (slip op.) delete footnote 8. Insert a new footnote that shall read: "The FDIC argues also that it had a due process right to an oral hearing. The arbitration involved here was private, not state, action; it was conducted pursuant to contract by a private arbitrator. Although Congress, in the exercise of its commerce power, has provided for some governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim."

With these changes, the panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

PER CURIAM:

The FDIC appeals a judgment refusing to rescind its contract with Air Florida and enforcing an arbitration award in Air Florida's favor. We reverse in part, vacate in part, and remand.

BACKGROUND

In its capacity as receiver of the United States National Bank, the FDIC became a major creditor of the Westgate-California Corporation ("Westgate"). As such, the FDIC was entitled to a large block of Westgate stock once Westgate's reorganization in bankruptcy was completed. In 1980, the FDIC sold its Westgate interests to Air Florida for $15.4 million. As part of the agreement, Air Florida promised to make a general public offer for outstanding Westgate common shares at no less than the price it paid the FDIC. If Air Florida acquired more than 80% of Westgate's common stock, and if it paid more per share to tender-offerees than the FDIC received, the FDIC was entitled to additional compensation to afford it the same price per share paid the tender-offerees.

Air Florida purchased the Westgate stock in order to acquire Air California, a Westgate controlled corporation. After Air Florida purchased the FDIC's interest in Westgate, however, Westgate's bankruptcy trustees arranged, and the district court approved, the sale of Air California to a third party for $61.5 million. The sale caused a substantial increase in the trading price of outstanding shares of Westgate common stock. Air Florida had paid

approximately $18 per share for the stock, but after Air California's sale, Westgate shares traded between $21 and $26.50 per share.

In February 1982, Air Florida informed the FDIC that it had decided not to make a tender offer. On April 1, 1982, Westgate's directors announced that Westgate would be liquidated with shareholders receiving $28.25 per share of common stock.[1] On April 30, the FDIC brought suit against Air Florida seeking rescission and restitution because Air Florida had failed to make the tender offer. In defense, Air Florida denied that it had a contractual duty to make an offer at a price exceeding the price paid to the FDIC and argued that the rise in Westgate's market price excused its tender offer obligation. The FDIC asserted that Air Florida was required to make an offer reasonably calculated to acquire the shares, no matter what the market price.

Air Florida counterclaimed for $2 million it alleged was owing under a separate provision in the contract that required adjustment of the purchase price of the stock upon sale of a cannery owned by Westgate. After a bench trial, the district court adopted Air Florida's interpretation of the contract, holding that Air Florida had not breached its agreement with FDIC. *FDIC v. Air Florida Sys., Inc.*, No. 85-0525-N(H) (S.D.Cal. Jan. 6, 1983) (Findings of Fact and Conclusions of Law). Having rejected the FDIC's rescission claim, the district court held that the contract, including the cannery adjustment provision, remained in effect. The amount of the adjustment was left open until "determined by the parties, the parties' designated accountants or an independent ac-

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[1]The liquidating dividend was paid on May 3, 1982. Air Florida realized a gain of more than $10 per share over the price paid to the FDIC, a $3.86 million profit on its Westgate common shares.

countant pursuant to the arbitration procedures set forth in . . . the [purchase] Agreement." *Id.* at 9.

When neither the parties nor their accountants could reach an agreement on the cannery adjustment, the contractual arbitration process was invoked. Following the arbitration, which resulted in a $1,486,000 adjustment in favor of Air Florida, the FDIC moved to vacate the award because of the arbitrator's failure to hold an oral hearing. The district court held that "the arbitrator's election to resolve the question . . . based on written submissions alone, did not deny the FDIC a fundamentally fair hearing." *FDIC v. Air Florida,* No. 82-0525-N(I) (C.D.Cal. July 10, 1984) (unpublished order). The court granted Air Florida's cross-motion to enter the arbitration award as part of the judgment and allowed prejudgment interest on the award.

DISCUSSION

1. *The Tender Offer*[2]

The Written Agreement

Air Florida's obligation to make a tender offer is governed by the Purchase and Sale Agreement (the Agreement) comprised of a November 14, 1980 agreement (November Agreement), and an earlier agreement entered into on October 27, 1980 (October Agreement)

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[2]The meaning of a contractual term and the determination whether such a term is ambiguous are both questions of law subject to de novo review. *United States v. City of Twin Falls*, 806 F.2d 862, 869 (9th Cir. 1986). If ambiguity exists and the district court makes factual findings as to the parties' intent, the court's findings will not be disturbed unless clearly erroneous. *Id.* Here, because we find no ambiguity, *see infra* at ___, our review is de novo.

incorporated by reference into the Agreement.[3] Paragraph 6.01 of the October Agreement provides:

> Air Florida, at its own expense, agrees to make a general public offer to the holders of the Common Stock of [Westgate] to acquire the shares of Common Stock owned by such holders ('Shareholders') no later than 425 days after the date of Consummation ('Offer').

Conditions precedent to Air Florida's duty to make the tender offer are set out in paragraph 6.04 of the October Agreement:

> The obligation of Air Florida to make the Offer shall be subject to (i) compliance with all applicable laws and regulations regulating tender or exchange offers and any other applicable laws and regulations; (ii) Consummation [of the Westgate reorganization]; and (iii) completion of the transfer [of title to the FDIC securities to Air Florida].

Under paragraph 6.03 of the October Agreement, "[t]he minimum price for a share of Common Stock pursuant to the Offer" was to be the price actually paid by Air Florida to the FDIC.

Paragraph 12 of the November Agreement, "*Right to Benefits of Tender Offer*," in part provides:

> [Air Florida] has agreed to make an offer to all the holders of the Common Stock of [Westgate] ("Offer"). If [Air Florida] is successful in acquiring 80% of the Common Stock . . . of [Westgate] pursuant to the Offer, this Agreement and

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[3]We refer to the "October Agreement" and the "November Agreement" only to facilitate citation to particular clauses. Together, the two documents constitute the Agreement.

> as a result of any previously acquired Common Stock, then FDIC shall have the option to obtain an equivalent amount of consideration which [Air Florida] offers for each share of Common Stock of [Westgate] pursuant to the Offer.

The FDIC argues that Air Florida had an obligation to make a bona fide tender offer at a price adequate to attract offerees subject only to the conditions of paragraph 6.04 of the October Agreement, all of which were satisfied. Air Florida asserts that its only duty was to make the tender offer at the price that it paid the FDIC. Air Florida argues that the sole purpose of the tender offer provision was to protect the FDIC from shareholder lawsuits that might allege that the FDIC had improperly exacted a premium for its block of stock. According to Air Florida, the provision was simply to ensure that other shareholders got at least as much as the FDIC.

Paragraph 15.4 of the October Agreement states that the "Agreement shall be construed, governed and enforced in accordance with the laws of the State of California." Under California law, the paramount principle informing contract interpretation is to give effect to the intention of the parties. *Healy Tibbitts Constr. Co. v. Employers' Surplus Lines Ins. Co.,* 140 Cal. Rptr. 375, 379 (Cal. App. 1977). The court should ascertain the intention of the parties from the writing alone, if possible. Cal. Civ. Code § 1638; *Healy Tibbitts Constr. Co.,* 140 Cal. Rptr. at 379. The words are to be understood in their ordinary sense unless a special meaning is given by usage. Cal. Civ. Code § 1644.

[1] A straightforward reading of the Agreement requires that we find that Air Florida had a duty to make a

"tender offer" within 425 days of consummation.[4] The district court's findings are in accord, but it found that the duty was limited to an offer at the "minimum price" defined in the contract as the price per share paid to the FDIC. Because Westgate stock always traded above the minimum price during the 425 day period, an offer at the minimum price would have been a futile act. Accordingly, the district court held that Air Florida's obligation was excused.

[2] The district court misread the Agreement when it concluded that Air Florida's duty was limited to a tender offer at the minimum price.[5] A tender offer has certain characteristics that set it apart from other market transactions. We have previously articulated some of those characteristics:

> (1) active and widespread solicitation of public shareholders for the shares of an

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[4]The Agreement uses the term "general public offer" and "tender offer" interchangeably. *See* October Agreement ¶ 6.01 ("Air Florida agrees to make a general public offer"); November Agreement ¶ 12 (entitled *"Rights to Benefits of Tender Offer"*).

[5]Air Florida also agreed to make an offer for Westgate preferred stock. That agreement *was* limited to the price that Air Florida paid the FDIC for its preferred stock. Paragraph 14 of the November Agreement provides:

> Subject to the provisions of Section 6.04, [*see supra at* ____,] Air Florida agrees to make a general public offer to the holders of the Class A Preferred Stock of [Westgate] to acquire the shares of Preferred Stock owned by such holders ("Holders") no later than 425 days after the date of Consummation ("Offer") on the same terms and conditions, and for the same price, as paid to FDIC for its Preferred Stock.

Of course, this commitment ran to shareholders other than FDIC. Unlike paragraph 14, the provisions dealing with the offer for com-

> issuer; (2) *solicitation made for a substantial percentage of the issuer's stock;* (3) *offer to purchase made at a premium over the prevailing market price;* (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only a limited period of time; (7) offeree subjected to pressure to sell his stock.

Polinsky v. MCA, Inc., 680 F.2d 1286, 1291 (9th Cir. 1982) (quoting *Wellman v. Dickinson*, 475 F.Supp. 783, 823-24 (S.D.N.Y. 1979)) (emphasis added). In other words, a "tender offer" is made in aid of a bona fide attempt to acquire control of a company. At the very least, it is an offer reasonably calculated to persuade shareholders to sell their stock. Air Florida's interpretation differs from the ordinary meaning of the term "tender offer." An offer of only the minimum price, in the face of a higher market price, in our view would not be a bona fide tender offer.

[3] Furthermore, the bargain price that Air Florida paid the FDIC for the Westgate stock supports the conclusion that the parties contemplated that the tender offer price might be higher than the price paid to the FDIC. Air Florida agreed to pay $15.4 million for stock with an estimated value in excess of $17 million. Air Florida's promise to make a tender offer served as partial consideration. The FDIC took the risk that it would get nothing more if the price of Westgate shares declined or remained the same, but it contracted for additional com-

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mon stock do not state that the offer shall be at a particular price, but rather that it shall *not be below* a particular price. *See supra at* ____ (¶¶ 6.01 & 6.03). The difference between Air Florida's obligations with respect to the common stock and the preferred stock supports FDIC's interpretation of the contract.

pensation if the price went up. Air Florida's interpretation would render its promise illusory and give it a windfall at the FDIC's expense.

Air Florida contends that certain provisions of the Agreement belie a finding that it was required to make a bona fide tender offer for the FDIC's benefit. First, it cites paragraph 6.02, which states that "[t]he Offer, at the option of Air Florida, may . . . contain such terms and conditions as are generally customary in tender or exchange offers, as the case may be." This paragraph, as we read it, simply leaves the peripheral terms of the offer to the discretion of Air Florida but does not speak to price and does nothing to diminish Air Florida's obligation to make the offer required by other sections of the Agreement.

Second, Air Florida attaches significance to the fact that it had the option of adjusting the tender offer price downward, under paragraph 6.03, if Westgate's cannery had not been sold at the time of the offer, in order to "adjust for an estimated Cannery Adjustment." However, this provision simply recognizes that the *minimum* offer price was not fixed when the agreement was signed because the price Air Florida was to pay to the FDIC, was subject to the cannery adjustment. *See supra* at ____. The uncertainty as to the minimum price does not support an argument that the minimum price was the only price at which Air Florida was required to make its offer.

Finally, Air Florida claims that paragraph 13 of the November Agreement entitled "*Third Party Beneficiary,*" which states that the tender offer provisions "are for the benefit of the proposed tender offerees," is an explicit statement that the offer was *not* intended to benefit the FDIC. We disagree. Creating legal rights under the contract for persons who would otherwise not have such rights does not diminish the rights of the parties to the

contract. Paragraph 13 replaced paragraph 6.05 of the October agreement, under which there were *no* rights for third-parties; it does not derogate from Air Florida's obligations to the FDIC.

[4] We conclude that the plain language of the Agreement imposed a duty on Air Florida to make a tender offer at a price reasonably calculated to obtain outstanding shares of Westgate. Nothing in the contract supports Air Florida's contention that the minimum price that it was required to offer was also the maximum price.

Extrinsic Evidence

[5] Air Florida would have us look to the circumstances surrounding the sale of the FDIC's interest in Westgate to support its interpretation of the contract. Even were we to assume that Air Florida's extrinsic evidence is admissible because it "is relevant to prove a meaning to which the language of the [Agreement] is reasonably susceptible," *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968), the proffered evidence does nothing to contradict the plain meaning of the agreement or render it ambiguous.

First, Air Florida points to the resolution of the FDIC's Board of Directors approving the sale to Air Florida. It states that the FDIC "is hereby authorized to sell its interest in [Westgate] . . . for the total consideration of approximately $15,432,000," without mentioning the possibility of additional compensation flowing from the tender offer. The resolution, however, contained at most only a cursory summary of the proposed Agreement, without any reference to the contingencies contained in the Agreement. The resolution does not mention the anticipated cannery adjustment or the fact that additional compensation would be due if a successful tender

offer at over $18 per share were made. Simply put, all contract provisions that could affect the price were not incorporated in the FDIC board resolution approving the sale of Westgate. Thus, the omission of reference to the tender offer in the resolution is not helpful one way or the other in determining the parties' intent.

Second, Air Florida asserts that a letter from the FDIC's counsel to the attorney representing Westgate shareholders demonstrates that the FDIC understood Air Florida's obligation to require a tender offer only at the minimum price. The relevant part of the letter states: "In our telephone conversation, we also discussed the fact that the final price of the tender offer may be subject to adjustment. We specifically discussed a potential cannery adjustment . . . . I can give you no additional enlightenment on what price . . . will be realized for the cannery." The letter makes no mention of an adjustment necessitated by increases in the price of Westgate stock. It appears, however, that the FDIC's counsel was responding to an expressed concern that the final price might be decreased based on the cannery adjustment; he was not otherwise addressing the terms of the Agreement.

Third, Air Florida claims that various filings it made with the Securities and Exchange Commission demonstrate that its commitment was at the minimum price. Air Florida cites the schedule 13D filed the day after the October Agreement was executed. This document, however, supports FDIC's position. In relevant part, the Schedule 13D states: "The minimum price pursuant to the tender or exchange offer must be at least equivalent to the final price per share of Common Stock paid to the FDIC." It does not say "the price," it says "the minimum price" and clearly contemplates the possibility of a higher price. Air Florida also points to its Schedule 14D-1 (tender offer statement). This document estimates that the

purchase price per share of Westgate common stock will be $18. However, the 14D-1's estimate was accurate when filed because current market price was well below $18 per share. The 14D-1 also states that "[s]ignificant contingencies exist with respect to the final purchase price . . . ." Moreover, the section of the 14D-1 that describes Air Florida's contractual obligations tracks the language used in the Agreement. It states: "Air Florida has agreed that the minimum price offered pursuant to such tender and exchange offer must be at least equivalent to the final price per share . . . paid by Air Florida to the FDIC . . . ." Thus, we find no support for Air Florida's interpretation of the agreement in its SEC filings.

Finally, Air Florida claims that the decision of Westgate's trustee to sell Air California and the FDIC's objections to the sale support its interpretation of the agreement. The trustee, in determining whether to make the sale, compared the value to Westgate's creditors of Air Florida's tender offer with that of the purchase offer made by the successful buyer, Air California Investments. The trustee considered the value per share of the tender offer to be the price paid to the FDIC — that is, the minimum price provided for in the Agreement. This is understandable since the calculation was made at a time when stock in the reorganized Westgate had not yet been issued and the only reasonably firm figure available to the trustee was the minimum price. For the same reason, the FDIC's objections filed to the sale of Air California do not contain an argument that the value of Air Florida's tender offer had been understated. We doubt that a court comparing a firm cash offer to the potential rise in price of unissued stock would rely on that potential to reject the sale. Thus, the FDIC's failure to make such an argument cannot be taken as proof that it understood the minimum price to be the only price Air Florida was obligated to offer.

[6] In sum, we find nothing in Air Florida's proffered extrinsic evidence[6] that contradicts the plain meaning of the Agreement. Air Florida had a duty to make a tender offer at a price reasonably calculated to induce shareholders to tender their shares. Air Florida's failure to make such an offer breached its Agreement with the FDIC.

The Remedy

The FDIC claims that Air Florida's failure to make the agreed-upon tender offer constituted a failure of consideration entitling the FDIC to rescind the Agreement.[7] The remedy the FDIC requests is at least a partial restitution of Air Florida's profits and a discharge from its obligation to pay Air Florida the money owing for the cannery adjustment. In support of its right to rescind, the FDIC relies on California Civil Code Section 1689, which, in relevant part, provides:

> (b) A party to a contract may rescind the contract in the following cases:
>
> * * *
>
> (2) If the consideration for the obligation of the rescinding party fails, in whole or in part,

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[6]Air Florida presents its extrinsic evidence by way of a selective chronological statement of facts and events surrounding the making of the Agreement with the FDIC. That we may not have specifically addressed every element in that chronology does not mean that we have not considered every element.

[7]In its First Amended Complaint, the FDIC also claimed that it was entitled to rescind based on California Corporations Code § 25401 (untrue statements and omissions) as well as on section 10b of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, (false statements). The FDIC does not appeal from the district court's denial of these claims.

> through the fault of the party as to whom he recinds.
>
> * * *
>
> (4) If the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause.

[7] Air Florida's refusal to perform its tender-offer obligation constitutes a failure of consideration. *See Taliaferro v. Davis,* 31 Cal. Rptr. 164, 172 (Cal. App. 1963). Although Air Florida paid the FDIC over fifteen million dollars in consideration, "[t]he right to rescind for a partial failure of consideration may be exercised although there has been a partial performance by the party against whom the right is exercised." *Coleman v. Mora,* 69 Cal. Rptr. 166, 173 (Cal. App. 1968). However, a partial failure of consideration justifies rescission only if the failure is " 'material,' or go[es] to the 'essence' of the contract." *Wyler v. Feuer,* 149 Cal.Rptr. 626, 633 (Cal. App. 1978); *see also Pennel v. Pond Union School Dist.,* 105 Cal. Rptr. 817, 821 (Cal. App. 1973) (breach must be material); *Taliaferro,* 31 Cal. Rptr. at 172 (failure to perform must constitute a breach in an "essential particular"). *But see Crowfoot Lumber v. Thompson,* 329 P.2d 302, 308 (Cal. App. 1958) (indicating that breach must go to the "essence" of the contract only if there has been no repudiation). Thus, the right to rescind a particular contract "depends upon the gravity of the breach" relied on to justify the rescission. *Crowfoot Lumber,* 329 P.2d at 308, *quoted in Taliaferro,* 31 Cal. Rptr. at 172.

[8] Whether a breach constitutes a failure of consideration sufficient to be deemed material and thus to warrant rescission of a contract is a question of fact properly determined by the trial court. *Calabrese v. Rexall Drug & Chem. Co.,* 32 Cal. Rptr. 665, 670 (Cal. App. 1963). *Cf. Bonadelle Constr. Co. v. Hernandez,* 337 P.2d 85, 87 (Cal.

App. 1959) (substantial performance is a question to be determined case-by-case, based on the particular facts and circumstances). In the instant case, because the district court concluded that there had been no breach of the Agreement, it found that there had been no material failure of consideration and accordingly that the FDIC was not entitled to rescind the agreement. Because we find a breach, we remand to the district court to determine whether the breach was material.

[9] If the district court finds that Air Florida's failure to make the tender offer constituted a material breach, the FDIC is entitled to rescind, thus extinguishing the Agreement.[8] Cal. Civ. Code § 1688. If rescission of the Agreement is warranted, the FDIC's further obligations under the contract — in particular, those relating to the cannery adjustment — are discharged, and it may be entitled to a restitutionary remedy. *Crowfoot Lumber,* 329 P.2d at 308 (quoting Corbin on Contracts § 1104). California Civil Code section 1692, entitled "Relief Based on Rescission," states that "[t]he aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled . . . ." Under section 1692, the court may also require the rescinding party "to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties."

[10] If, on the other hand, the district court determines that the Agreement cannot be rescinded, it nevertheless "may grant any party to the action any other relief to which he may be entitled under the circumstances." Cal. Civ. Code § 1692. In other words, a breach insuffi-

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[8]Air Florida is entitled to raise the several affirmative defenses that the district court declined to pass on earlier.

ciently material to form the basis for rescission may entitle the aggrieved party to a restitutionary remedy or damages. Clearly Air Florida's breach entitles FDIC to either an equitable restitutionary remedy or a legal damages remedy. The appropriate remedy and its scope are matters properly to be determined by the district court on remand.

2. *The Cannery Adjustment*

The FDIC challenges the cannery adjustment arbitration award entered in favor of Air Florida, first, on the ground that its performance has been excused, and, second, on the ground that it was entitled to, and did not receive, an oral hearing before the arbitrator. The FDIC also claims that the district court erred in granting prejudgment interest on the award.

Excuse of Performance

[11] If the district court determines that the FDIC can rescind the Agreement, the FDIC is relieved of its obligation to make further payments pursuant to the cannery adjustment, and the legality of the arbitration procedures will be moot. If, on the other hand, Air Florida's breach was not material, FDIC's obligation to provide additional consideration pursuant to the cannery adjustment would be excused only if that obligation was dependent upon Air Florida's obligation to make a tender offer. *Verdier v. Verdier,* 284 P.2d 94, 100 (Cal. App. 1955) (holding that if "covenants are independent, breach of one does not excuse the performance of the other"). The California courts indulge a strong presumption, how-

ever, against construing contractual obligations as dependent:

> To construe covenants as dependent is to work a forfeiture as to one party, and no obligation of a contract is to be regarded as a condition precedent unless made so by express terms or necessary implication. Where a breach is partial and is "capable of being fully compensated," the strong tendency is to regard it as insufficient to constitute a defense.

Id. (quoting *Redpath v. Evening Express Co.*, 88 P. 287, 289 (Cal. App. 1906)); *see Rubin v. Fuchs*, 459 P.2d 925, 928 (Cal. 1969).

[12] The Agreement does not say that the tender offer was a condition precedent to the cannery adjustment. Nor do we find a "necessary implication" that the obligations were dependent. Because it was entirely possible that the FDIC's obligation to provide further compensation under the cannery adjustment provision could have matured before the period in which Air Florida was required to make its tender offer, the tender offer could not be a condition precedent to the cannery adjustment. Thus, if the Agreement is not rescinded, FDIC's obligation to compensate Air Florida for the cannery adjustment has not been discharged.

Right to an Oral Hearing

FDIC asserts that the arbitrator's refusal to hold an oral hearing on the issue of contractual intent violated its rights and rendered the arbitration unenforceable. The arbitrator, who was an accountant, did meet with the FDIC and Air Florida accountants, but he then refused the FDIC's request to hold a further evidentiary hearing. Rather, he requested the parties to submit in written form the materials they wished to have considered. In support

of its interpretation of the cannery adjustment provision, FDIC submitted the affidavit of the attorney who negotiated the Agreement for the FDIC. The FDIC concedes that it could have submitted additional written documentation had it chosen to do so.

There is no disagreement that the federal Arbitration Act, 9 U.S.C. §§ 1-14 governs this dispute. Where the Act applies, it "provides the exclusive grounds for challenging an arbitration award within its purview." *Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986). Section 10 of the Act sets forth the circumstances under which a district court may vacate an arbitration award. 9 U.S.C. § 10. The FDIC relies on section 10(c) to support its claim of procedural deficiency. Section 10(c) permits vacation of an award

> [w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

9 U.S.C. § 10(c).

[13] While section 10(c) assumes that the parties to an arbitration will be afforded a hearing, neither in this section nor anywhere else in the Act are hearing procedures, much less oral hearing procedures, explicitly provided for. Certainly the parties may agree upon appropriate procedures by contract, but, where they do not, procedural matters "become part of the bundle of issues committed to decisions by the arbitrator." *Sheet Metal Workers Int'l Ass'n, Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 744 (9th Cir. 1985). An arbitration award should not be vacated on procedural grounds unless the procedure employed was a "sham, substantially

inadequate or substantially unavailable." *Harris v. Chemical Leaman Tank Lines,* 437 F.2d 167, 171 (5th Cir. 1971), *quoted in Dogherra v. Safeway Stores, Inc.,* 679 F.2d 1293, 1296 (9th Cir.), *cert. denied,* 459 U.S. 990 (1982). So long as the hearing provided is "full and fair," a procedural attack must fail. *Coast Trading Co. v. Pacific Molasses Co.,* 681 F.2d 1195, 1198 (9th Cir. 1982). Applying section 10(c), a hearing is full and fair unless the arbitrator (1) despite a showing of cause, refuses a postponement; (2) refuses to hear pertinent and material evidence; or (3) engages in misbehavior that prejudices the rights of a party. 9 U.S.C. § 10(c). The FDIC did not request a postponement and there is no allegation that the arbitrator refused to consider evidence the FDIC submitted. Finally, the failure to hold an oral hearing cannot be deemed misbehavior that prejudiced the FDIC's rights because the FDIC has not shown that its evidence was not amenable to presentation in written form. Admittedly, a "paper hearing" often will be an inadequate means to determine the facts upon which an arbitration decision must rely. In this case, however, the nature of the decision to be made leads us to conclude that the "paper hearing" was adequate.[9] As the district court noted:

> [W]hat the parties bargained for was not a quasi-judicial proceeding conducted by lawyers, but [rather] the professional opinion of an independent accountant on an accounting issue — the value of a business. Accountants derive their

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[9]The FDIC argues also that it had a due process right to an oral hearing. The arbitration involved here was private, not state, action; it was conducted pursuant to contract by a private arbitrator. Although Congress, in the exercise of its commerce power, has provided for some governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim.

> calculations not from evidentiary hearings, but from working papers and discussions with other accountants. Thus, it was predictable that the instant arbitrator would base his decision on this information. Nothing in the parties' contractual sequential valuation process manifests an intent to require an oral evidentiary hearing. Had the parties intended the arbitration to resolve primarily legal issues through evidentiary hearings, they surely would have agreed to use a lawyer, not an accountant, as the arbitrator, or declared arbitration rules as governing. Instead the parties instructed an accountant to resolve the dispute . . . , leaving the procedure to the arbitrator's sound discretion.

FDIC v. Air Florida, No. 82-0525-N(I) at 8-9 (July 10, 1984) (unpublished order).

Prejudgment Interest

The district court granted Air Florida interest on the arbitration award from the date of the arbitrator's decision. California law provides that

> [e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . .

Cal. Civ. Code § 3287(a). The Agreement between the FDIC and Air Florida states that the arbitrator's determination would be final and binding on the parties. As the FDIC concedes, under the terms of the Agreement, Air Florida was entitled to interest from the date of the award. The FDIC contends, however, that a stipulation in

the pretrial order changed this result. The stipulation reads:

> The parties have agreed that all issues with respect to the Cannery Adjustment will be determined by the Court, with the exception of the calculation of Net Cannery Cash Recovery and the resulting Cannery Adjustment under the Agreement. These calculations will be determined by . . . an independent accountant pursuant to the procedures . . . of the Agreement . . . The parties further have agreed that the judgment in this proceeding will remain open until said calculations have been performed and the Court is able to enter a single final judgment.

[14] The district court determined all issues relating to the cannery adjustment, with the exception of the adjustment calculation, before the date of the arbitration decision.[10] Thus, the question is whether the agreement to keep the district court proceeding open until the court was "able to enter a single final judgment" meant that Air Florida's right to recover under the cannery adjustment did not *vest* until the entry of the final judgment. *See* Cal. Civ. Code § 3287(a). We think that the answer is not. Although Air Florida may have agreed to await receipt of the proceeds from the cannery adjustment until the entry of a final judgment, it did not stipulate away its contract right to recovery on the date of the arbitration decision. *Cf. French v. Merill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 907 (9th Cir. 1986) (holding that, under section 3287(a), right to recover arbitration award *vested*

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[10]The pretrial order stated that two issues of law relating to the cannery adjustment remained to be determined. The district court resolved both issues in its Findings of Fact and Conclusions of Law of January 6, 1983, over a year before the arbitrator rendered his decision.

when plaintiff filed suit which resulted in the court compelling the disputed arbitration, and that damages are not made uncertain by the fact that liability is contested). The stipulation served to facilitate any set-offs that may have been required once the various claims and cross-claims in the litigation had been resolved, not to amend the original arbitration clause of the Agreement.

CONCLUSION

We hold that Air Florida's failure to make a tender offer breached its Agreement with FDIC. We remand to the district court to determine whether the breach constituted a material failure of consideration. If the failure of consideration was material, the FDIC was entitled to rescind the Agreement. If the Agreement is rescinded, the FDIC's obligation under the cannery adjustment provision of the Agreement is discharged and the FDIC is entitled to a restitutionary remedy to adjust the equities between the parties.

If the Agreement was not rescinded, the cannery adjustment provision remains in effect, and Air Florida is entitled to the arbitration award, with interest from the date of the arbitrator's decision. This amount, however, must be set off against an award of damages to the FDIC as compensation for Air Florida's breach of its obligation to make a tender offer.

The judgment dismissing the claim of the FDIC is REVERSED. The judgment enforcing the arbitration award with prejudgment interest is VACATED. The judgment granting attorneys' fees is VACATED. The cause is REMANDED to the district for proceedings consistent with this opinion.

REVERSED in part, VACATED in part, and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver of United States National Bank,
Plaintiff,

v.

AIR FLORIDA SYSTEM, INC.,
a Delaware corporation,
Defendant.

AIR FLORIDA SYSTEM, INC.,
a Delaware corporation,
Counter-claimant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver of United States National Bank,
Counter-defendant.

NO. 82-0525-N(H)

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The above-entitled case came on regularly for trial on September 8, 1982, before the Honorable Leland C. Nielsen, United States District Judge, sitting without a jury. Gary L. Hultquist of Bronson, Bronson & McKinnon and E. Whitney Drake appeared as counsel for plaintiff, Federal Deposit Insurance Corporation. Howard J. Privett, Ralph Zarefsky and Lisa C. Woods of McCutchen, Black, Verleger & Shea appeared as counsel for defendant Air Florida System, Inc. The Court having heard and examined the evidence offered by the respective parties and having read and considered the briefs filed on their

behalf; the cause having been submitted for decision after oral agrument by counsel; and the Court having heretofore made and announced its decision, and being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff Federal Deposit Insurance Corporation ("FDIC") is a corporation organized and existing under and by virtue of the laws of the United States, and appears here as receiver of the failed United States National Bank, a national banking association which was located in San Diego, California.

2. Defendant Air Florida System, Inc. ("Air Florida") is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in the State of Florida.

3. The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

4. In February of 1974, Westgate-California Corporation, a Nevada corporation ("Westgate") filed for reorganization under Chapter X of the Federal Bankruptcy Act, Case Nos. 74-413, 74-414, 74-1079, 74-1246 and 74-2271 (S.D. Cal.) ("Westgate Reorganization Proceedings"). As receiver of the failed United States National Bank, the FDIC filed certain proofs of claims against various Westgate entities, which claims subsequently were approved and allowed. The FDIC was the largest single creditor in the Westgate Reorganization Proceedings and was entitled to receive a substantial percentage of the common stock and substantially larger percentages of Class A and B preferred stock to be issued by the Reorganized Westgate.

5. On March 25, 1980, the Court in the Westgate Reorganization Proceedings entered an order confirming the Plan of Reorganization.

6. Commencing in August of 1980 and continuing until November 14, 1980, representatives of Air Florida and the FDIC negotiated the purchase by Air Florida of the FDIC's interest in Westgate. Both parties were represented by experienced counsel in the course of these negotiations.

7. At the conclusion of their negotiations, the agreement of the parties was fully and accurately reduced to writing. Under date of October 20, 1980, the FDIC and Air Florida executed a "Purchase Agreement" prepared by their counsel as the complete and exclusive statement of the terms agreed upon between the parties. After subsequent competitive bidding as to the price of the FDIC's interest in Westgate between Air Florida and another party in open court on November 14, 1980, the parties executed a further writing, an "Agreement for Purchase and Sale" (hereinafter "Agreement") which modified and otherwise incorporated the October 20, 1980 Purchase Agreement. The Agreement was approved by the Court in the United States National Bank Liquidation Proceedings (Case No. 73-445-N, S.D. Cal.).

8. On April 21, 1981, Air Florida and FDIC executed an Amendment to the Agreement, which was approved by the Court in the United States National Bank Liquidation Proceedings. On May 7, 1981, Air Florida waived its right of rescission, and on May 11, 1981, the FDIC executed an Assignment of Claims by which the FDIC assigned its claims in Westgate as Receiver to Air Florida "free and clear of any and all liens, encumbrances, charges, offsets, defenses or counterclaims of any kind or nature whatsoever."

9. The parol evidence regarding the Agreement offered by the parties at trial was received in evidence and fully considered. The parol evidence strongly supports the ordinary meaning to be given to the words used by the parties to express their intent in the Agreement and Air Florida's contentions as to the intent of the parties at the time they entered into the Agreement. The Court's findings regarding the Agreement are the same whether based solely on the writings executed by the parties as their Agreement or based also upon the extensive parol evidence offered by the parties.

10. The Agreement imposed a duty upon Air Florida to make a general public offer for the common and common equivalent stock of reorganized Westgate at a price (referred to as the "minimum price") at least equal to the price payable to the FDIC for its common and common equivalent stock of reorganized Westgate within 425 days following consummation of the Plan of Reorganization. Air Florida had no duty under the Agreement to make such offer at any price higher than the minimum price although it had the right to offer any price higher than the minimum price it deemed appropriate.

11. The FDIC bargained for and received under the Agreement an option to obtain an equivalent amount of consideration which Air Florida paid to other shareholders pursuant to its general public offering only if both of two contingencies occured: first, that the general public offer was made at a price greater than the price payable to the FDIC, and second, that Air Florida acquired 80% or more of the common stock of reorganized Westgate. The FDIC neither bargained for nor received any undertaking on the part of Air Florida to cause either of such contingencies to occur, and the Agreement imposed no duty on Air Florida to either offer a price higher than that payable

to the FDIC or to attempt to acquire 80% or more of the common stock of reorganized Westgate.

12. On or about May 13, 1981, the Court in the Westgate Reorganization Proceedings entered an order approving the Plan of Liquidation for Westgate, which provided that the corporation could be liquidated within one year. On May 26, 1981, the Court in the Westgate Reorganization Proceedings entered orders (1) authorizing distribution of Westgate-California Corporation stock and (2) declaring the Westgate Plan of Reorganization to be "substantially consummated."

13. Following such declaration of the consummation of the Plan of Reorganization, the reorganized Westgate issued its stock pursuant to the Plan. At all times after issuance, which occurred after June 1, 1981, the common stock traded at a price in excess of the $18.00 per share price paid to the FDIC by Air Florida.

14. Following consummation of the Plan of Reorganization, Air Florida proceeded in good faith with preparations for a tender offer for all Westgate common and common equivalent stock and continued to evaluate the prospects for such offer. By early 1982 the high cash liquidation value of Westgate common stock and the low market price of Air Florida stock made it clear that an offer at the price paid to the FDIC would not be successful, and Air Florida concluded in good faith that a tender offer at a price that was reasonable for it to offer would not be successful.

15. A tender offer by Air Florida during the 425 day period following consummation of the Plan of Reorganization at the price paid to the FDIC would have been an idle and futile act, and could have been confusing or misleading to the holders of reorganized Westgate common and common equivalent stock. Accordingly, Air Flor-

ida properly did not make the general offer it had a duty to make under the Agreement.

16. The FDIC sustained no damage or loss by reason of the fact Air Florida did not make the general public offer it was committed to make pursuant to the Agreement.

17. The liquidation of Westgate-California Corporation occurred on May 3, 1982 when the common stock of Westgate was cancelled in liquidation of the corporation, and a partial distribution of $28.25 per share in cash was made to all shareholders of record.

18. The FDIC failed to sustain its burden of establishing a material failure of consideration or breach of the Agreement by Air Florida.

19. Air Florida did not make any material misstatements of fact and did not omit to state any material facts in the course of negotiating, drafting or executing the tender offer provisions of the Agreement.

20. FDIC failed to sustain its burden of establishing grounds for rescission of the Agreement or that the FDIC is entitled to a set-off or to any other relief from the cannery adjustment provisions of the Agreement.

21. The foregoing findings make it unnecessary for the Court to decide the issues raised by Air Florida's affirmative defenses of laches, equitable estoppel or waiver.

22. Any conclusion of law hereafter determined to be a finding of fact is hereby found as a fact.

CONCLUSIONS OF LAW

1. Any finding of fact hereafter determined to be a conclusion of law is hereby made a conclusion of law.

2. The contract which is the subject of this action was executed in the State of California and provides that it "shall be construed, governed and enforced in accordance with the laws of the State of California." The contract was approved by the Court in the United States National Bank Liquidation Proceedings (No. 73-445-N, S.D. Cal.).

3. The Court has jurisdiction over the parties and of the subject matter of this action.

4. The parol evidence offered by the parties at trial is admitted into evidence. However, the Court's determination of this matter is the same whether the Court considers the admitted parol evidence or interprets the Agreement as a matter of law without the aid of parol evidence.

5. The Agreement imposed a duty on Air Florida to make an offer for the outstanding common and common equivalent stock of Westgate only at a price at least equal to the price payable to the FDIC (referred to as the "minimum price").

6. The Agreement did not impose a duty on Air Florida to make an offer at a price greater than the minimum price, nor did it impose a duty to attempt to acquire 80% of the Westgate common and common equivalent stock.

7. The Agreement provided Air Florida the right to make an offer at any price greater than the minimum price.

8. A tender offer at the minimum price would have been an idle and futile act. The law does not require idle acts, and accordingly, Air Florida was relieved of its duty to make an offer for the outstanding common and common equivalent stock at the minimum price.

9. The FDIC failed to establish that it sustained any damage or loss by reason of Air Florida's failure to make a tender offer.

10. Air Florida's failure to make a tender offer did not constitute a breach of the Agreement.

11. There was no material failure of consideration, and the FDIC is not entitled to rescind the Agreement.

12. The Agreement remains in full force and effect, and the parties remain subject to the terms thereof, except that Air Florida is relieved of its duty to make a general public offer to the shareholders of reorganized Westgate.

13. Air Florida did not violate California Corporations Code § 25401.

14. Air Florida did not violate Section 10b of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, or Rule 10b-5 of the SEC, 17 CFR § 240.10b-5.

15. Air Florida is entitled to judgment in its favor on Plaintiff's First Amended Complaint.

16. Air Florida is entitled to judgment on its First Counterclaim, and is entitled to a declaration that Air Florida is relieved of its duty to make an offer for the common and common equivalent stock, that otherwise the Agreement remains in full force and effect, and that the parties remain subject to all of the duties and entitled to all of the rights provided by the terms of the Agreement.

17. The affirmative defenses raised by the FDIC with respect to Air Florida's Second Counterclaim for recovery of any cannery adjustment owing under the Agreement are without merit and do not afford any basis for a change in the cannery adjustment or a set-off in favor of the FDIC. In accordance with the stipulation of the parties approved by this Court in the Pretrial Order, the

amount of the net cannery cash recovery and the resulting cannery adjustment shall be determined by the parties, the parties' designated accountants or an independent accountant pursuant to the arbitration procedures set forth in Paragraph 7(b) of the Agreement, and the amount thereof shall be inserted in the final judgment entered in this case.

18. Pursuant to the Agreement and California Code of Civil Procedure § 490.020, Air Florida is entitled to recover from the FDIC reasonable attorney fees and disbursements incurred by Air Florida in this action. Failing agreement of the parties as to the proper amount thereof, the court will fix the same on motion of either party. Said amount shall be inserted in the final judgment entered in this case.

19. Air Florida is entitled to recover its costs of suit herein.

Let judgment be entered accordingly.

DATED: January 6, 1983

LELAND C. NIELSEN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of United States National Bank,
Plaintiff,

v.

AIR FLORIDA SYSTEMS, INC.,
a Delaware corporation,
Defendant.

AIR FLORIDA SYSTEMS, INC.,
a Delaware Corporation; and
INTERFIRST BANK DALLAS, N.A.,
Real Party in Interest
as Assignee of Benefits of
Air Florida Systems' Interests in
Westgate Liquidating Trust,
Counter-claimants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of
United States National Bank,
Counter-defendant.

Case No. 82-0525-N(I)

AMENDED JUDGMENT

The above-entitled case came on regularly for trial on September 8, 1982, before the Honorable Leland C. Nielsen, United States District Judge, sitting without a jury. Gary L. Hultquist of Bronson, Bronson & McKinnon and E. Whitney Drake appeared as counsel for plaintiff, Federal Deposit Insurance Corporation as receiver of the failed U.S. National Bank (hereafter "FDIC"). Howard

J. Privett, Ralph Zarefsky and Lisa C. Woods of McCutchen, Black, Verleger & Shea appeared as counsel for defendant Air Florida Systems, Inc. (hereafter "Air Florida"). The Court having heard and examined the evidence offered by the respective parties and having read and considered the briefs filed on their behalf; the cause having been submitted for decision after oral argument by counsel; the Court having heretofore made and filed its findings of fact and conclusions of law; and the Court having entered its order re intervention, finding InterFirst Bank Dallas, N.A. ("InterFirst Bank Dallas") as a real party in interest and assignee of Air Florida,

It is therefore ORDERED, ADJUDGED AND DECLARED THAT:

1. Plaintiff FDIC have and take nothing by its First Amended Complaint against Air Florida and that the same be and hereby is dismissed on the merits;

2. Air Florida was relieved of its duty to make a general public offer for the common and common equivalent stock of the Westgate-California corporation. In all other respects, the Agreement for Purchase and Sale dated November 14, 1980, between the parties (the "Agreement") remains in full force and effect, and the parties remain subject to all of the duties and entitled to all of the rights provided by the terms of the Agreement.

3. InterFirst Bank Dallas, as assignee of Air Florida under that certain "Bill of Sale and Assignment" dated August 18, 1983, between and among Air Florida, Inc., Air Florida Systems, Inc. and InterFirst Bank Dallas, N.A., shall have and recover on the Second Counterclaim from the FDIC the sum of $1,486,000.00 in respect of the Cannery Adjustment as defined in the Agreement, together with prejudgment interest thereon at 7% per an-

num from and after February 27, 1984 in the total amount of $167,574.12.

4. Air Florida shall have and recover attorneys' fees in the amount of $322,000.00, plus its costs of suit in the amount of $6,503.41 from the FDIC.

5. The Right to Attach Order, dated April 30, 1982, shall be and is hereby set aside, and the Writ of Attachment, dated April 30, 1982, shall be and is hereby quashed.

Dated: 10-7-85

LELAND C. NIELSEN

Leland C. Nielsen
United States District Judge

APPENDIX C

The following represents the parents, affiliates, and subsidiaries of the Petitioners.

Air Florida System, Inc.
Jet Florida System, Inc.
Air Florida, Inc.
Airport Systems, Inc.
Jet Florida, Inc.

Petitioner Air Florida System, Inc. no longer exists under that name. On July 3, 1984 it filed for reorganization under Chapter 11 of the Bankruptcy Act. Through the reorganization all affiliates, parents and subsidiaries have been merged into a new entity, Jet Florida, Inc. On June 28, 1985 the Bankruptcy Court lifted the automatic stay in order to permit this litigation to proceed through appeal.

InterFirst Bank Dallas, N.A.

Petitioner InterFirst Bank Dallas, N.A. recently has changed its name to First RepublicBank Dallas, N.A. Its parent, subsidiaries and affiliate corporations are:

First RepublicBank Corporation
First RepublicBank Dallas, N.A.
Republic International Company
Republic International Dallas Do Brazil Limitada
Republic Overseas Corporation
Republic International Finance (ASIA) Ltd.
Republic Dallas Ltd.
Inverfin
Republic National Corporation
Medipark, Inc.
Livingston, Inc.
Republic Computer Corporation
Republic Loan Company of Oklahoma, Inc.
Republic Venture Group, Inc.

Pine Island Oil Corporation
United Petroleum Company
Prairie Land Co.
Republic National Leasing Corporation
Republic Commercial Finance Corporation
R.P.L., Inc.
D.P.C., Inc.
Republic Energy Group Denver, Inc.
First RepublicBank Mortgage Corporation
InterFirst Venture Corporation
Buslease, Inc.
Central Airlines Ltd.
Communications Partners
Contemporary Enterprises
Empire Central Commerce Ltd.
Europa Bakers
Gardiner Communications
Hoker Broadcasting
Houston Wire and Cable International, Inc.
Luna-Royal, Ltd.
Monarch Paint
Stemmons-Carrollton, Ltd.
Universal Cable Holdings
Young Distribution Companies, Inc.
The Corners, Ltd.
CSM, Inc.
InterFirst Leasing, Inc.
First National in Dallas Representacao y Limitada
MESBIC Financial Corporation of Dallas, Inc.
Plaza Premises Corporation
InterFirst Capital Corporation
InterFirst L.P.O. Corporation
InterFirst Condominium, Inc.
Intercon Management Co., Inc.
First RepublicBank International Corporation (formerly InterFirst International Corporation)

InterFirst (Leasing) Limited
InterFirst Condominium Association
I.F. Land, Inc.
First RepublicBank Houston, N.A.
Republic Energy Group Louisiana, Inc.
APL, Inc.
Nineteen Hundred Main Corporation
1100 Louisiana Inc.
1100 Smith Inc.
First RepublicBank Braes Bayou, N.A.
First RepublicBank Henderson, N.A.
First RepublicBank Lufkin
First RepublicBank Brownwood, N.A.
First RepublicBank Dallas East, N.A.
First RepublicBank Garland, N.A.
First RepublicBank Grand Prairie, N.A.
First RepublicBank Carrollton
First RepublicBank Ridglea
Ridglea Building Company
First RepublicBank Greenville Avenue
First RepublicBank San Antonio, N.A.
First RepublicBank Mineral Wells, N.A.
Brazos Valley Computer Center, Inc.
First RepublicBank Fort Worth East, N.A.
First RepublicBank Austin
Austin National Realty Corporation
First RepublicBank Plano, N.A.
First RepublicBank A & M
First RepublicBank NW San Antonio, N.A.
First RepublicBank Las Colinas
First RepublicBank Oak Cliff
First RepublicBank South Austin
National Bank of Fort Sam Houston
First RepublicBank Northern Hills
First RepublicBank Richmond, N.A.
First RepublicBank Spring Branch

First RepublicBank Post Oak
First RepublicBank Kingwood, N.A.
First RepublicBank Northwest Austin, N.A.
First RepublicBank Westlake, N.A.
First RepublicBank North Dallas, N.A.
First RepublicBank Lubbock, N.A.
Askew & Brown, Inc.
First RepublicBank Waco, N.A.
Central Texas Small Business Investment Company
First RepublicBank Tyler, N.A.
First RepublicBank Midland, N.A.
First RepublicBank Eldridge, N.A.
First RepublicBank Countryside, N.A.
First RepublicBank Richardson
First RepublicBank Preston North, N.A.
RepublicBank Delaware
Republic National Company
Republic of Texas Company — Subsidiary of Republic of Texas Corporation
First RepublicBank Trust Company
RepublicBank Insurance Agency, Inc.
First State Corporation of Lufkin
Republic Investment Advisory Services, Inc.
Republic Investment Company, Inc.
Fort Sam Life Insurance Company
Republic Money Orders, Inc.
Republic National Bank Building Company
Republic of Texas Properties, Inc.
Republic National Bancorporation, Inc.
RepublicBank Leasing Company
Republic of Texas Corporation
Republic Venture Capital Corporation
RepublicBank Trading Company
IFRB Corporation
First RepublicBank Dallas, N.A.
First RepublicBank Houston, N.A.

First RepublicBank San Antonio, N.A.
First RepublicBank Austin, N.A.
First RepublicBank Carrollton
First RepublicBank Corsicana, N.A.
Diamond Properties, Inc.
First RepublicBank Denison, N.A.
First RepublicBank DFW Freeport, N.A.
First RepublicBank Ennis, N.A.
First RepublicBank Forney
First RepublicBank North Dallas, N.A.
First RepublicBank Greenville, N.A.
First RepublicBank Hutchins
First RepublicBank Irving
First RepublicBank Las Colinas
First RepublicBank Malakoff
First RepublicBank Mt. Pleasant, N.A.
First RepublicBank Oak Cliff
First RepublicBank Paris
First RepublicBank Park Cities
First RepublicBank Pleasant Grove
First RepublicBank Tyler, N.A.
First RepublicBank Baytown
First RepublicBank Jefferson County
First RepublicBank Conroe, N.A.
First RepublicBank Fannin
First RepublicBank Galveston, N.A.
First RepublicBank Greenspoint
First RepublicBank Harlingen, N.A.
First RepublicBank East Houston
First RepublicBank SW Houston, N.A.
First RepublicBank Nassau Bay, N.A.
First RepublicBank Pasadena
First RepublicBank Post Oak
First RepublicBank San Felipe, N.A.
First RepublicBank Tomball
First RepublicBank Victoria

First RepublicBank Alamo Heights, N.A.
First RepublicBank Clifton
First RepublicBank Hillsboro
First RepublicBank North Austin, N.A.
First RepublicBank Williamson County, N.A.
First RepublicBank NW San Antonio, N.A.
First RepublicBank Oak Hill, N.A.
First RepublicBank Temple, N.A.
First RepublicBank Westlake, N.A.
First RepublicBank Abilene, N.A.
SORA, Inc.
First RepublicBank Arlington, N.A.
First RepublicBank Cleburne, N.A.
First RepublicBank El Paso, N.A.
First RepublicBank Gateway, N.A.
First RepublicBank Odessa, N.A.
First RepublicBank Richland, N.A.
First RepublicBank River Oaks
First RepublicBank South Fort Worth
First RepublicBank Stephenville, N.A.
First RepublicBank SW Arlington, N.A.
First RepublicBank University Drive
Manhattan Development Corporation
First RepublicBank Waco, N.A.
First RepublicBank Wichita Falls, N.A.
InterFirst Garage, Inc.
InterFirst Bank Delaware
First United Bancorporation, Inc.
First RepublicBank Fort Worth, N.A.
InterFirst Finance Company
InterFirst Financial Corporation
InterFirst Funding Corporation
InterFirst Insurance Company
First RepublicBank Asset Management Company (formerly InterFirst Investment Management, Inc.)
InterFirst Lending Corporation

InterFirst Life Insurance Company
InterFirst Park Cities Realty, Inc.
InterFirst Properties, Inc.
First RepublicBank Securities Company
InterFirst Securities Company in Dallas
InterFirst Services Corporation
InterFirst Services Corporation in Houston
InterFirst Services Corp. in Fort Worth
InterFirst Texas Finance N. V.
First RepublicBank Trade, Inc.
First International Bancshares Corporation (a Delaware corporation)
First International Nevada Corporation
MBV, Inc.
The Peoples Company
InterFirst Corporation (an Arkansas corporation)
InterFirst Corporation (a Colorado corporation)
InterFirst Corporation (a Louisiana corporation)
InterFirst Corporation (a New Mexico corporation)
InterFirst Corporation (a New York corporation)
InterFirst Corporation (an Oklahoma corporation)
InterFirst Services Corporation (an Arkansas corporation)
InterFirst Services Corporation (a Colorado corporation)
InterFirst Services Corporation (a Louisiana corporation)
InterFirst Services Corporation (a New Mexico corporation)
InterFirst Services Corporation (an Oklahoma corporation)
First Dallas Financial Corporation
FNB Financial Company
First International Realty Services, Inc.
First International Mortgage Company
First International Leasing Corporation

First International Management Services, Inc.
First International Bancshares Corporation (a Texas corporation)
First National Finance Company

APPENDIX D

12 U.S.C. § 192:

§ 192. Default in payment of circulating notes

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

. . .

FED R. CIV. P. 52(a):

Rule 52. Findings by the Court

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless

clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 18, 1987, I served the within Petition for a Writ of Certiorari in re: "Air Florida System, Inc.; InterFirst Bank, Dallas, N.A. vs. Federal Deposit Insurance Corporation" in the Supreme Court of the United States, October Term 1987, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

David L. Sanborg, Esquire
Elliot L. Bien, Esquire
Bronson, Bronson & McKinnon
555 California Street
San Francisco, California 94104

John Murphy, General Counsel
E. Whitney Drake, Special Counsel
Office of the General Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

All Parties to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 18, 1987, at Los Angeles, California.

J. GORDON HOOPER

SUPREME COURT, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1049

In the Supreme Court of the United States

OCTOBER TERM, 1987

AIR FLORIDA SYSTEM, INC., AND
INTERFIRST BANK, DALLAS, N.A., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
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General Counsel

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Assistant General Counsel

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Special Counsel

IRA H. PARKER
Senior Attorney
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

1. Whether, when a contract entered into by a receiver has been approved by the district court overseeing the receivership and the receiver later brings a suit for breach of the contract which happens to be heard by the same district judge, the ordinary rule that the interpretation of an unambiguous contract provision is a question of law subject to de novo review on appeal is inapplicable, and the court of appeals is required to afford special deference to the district judge's interpretation.

2. Whether the court of appeals properly concluded that the meaning of the contract provision at issue in this case could be determined as a matter of law.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 822 F.2d 833. The opinion of the district court (Pet. App. B1-B12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1987. A petition for rehearing was denied on September 22, 1987. The petition for a writ of certiorari was filed on December 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In October 1973, United States National Bank (USNB), a national bank located in San Diego, California, was declared insolvent by the Comptroller of the Currency, and respondent Federal Deposit Insurance Corpora-

tion (FDIC) was appointed receiver (see Pet. App. B2). The assets of USNB included a substantial debt owed to USNB by Westgate California Corporation (Westgate). In February 1974, Westgate entered reorganization under the Bankruptcy Code. *Ibid.* The USNB receivership was Westgate's largest single creditor and was ultimately determined to be "entitled to receive a substantial percentage of the common stock and substantially larger percentages of Class A and B preferred stock to be issued by the Reorganized Westgate" (*ibid.*).

Petitioner Air Florida was interested in acquiring the USNB receivership's stake in Westgate in order to obtain control of Westgate's principal operating subsidiary, Air California (Pet. App. A6). Negotiations between Air Florida and the FDIC as receiver began in August 1980 and resulted in a purchase agreement in which Air Florida agreed to purchase the receivership's interest in Westgate. Air Florida agreed to pay the USNB receivership approximately $18 per share for its right to receive common stock in the reorganized Westgate and approximately $17.22 per share for its right to receive preferred stock (*id.* at A7; Pet. 6). The agreement was approved in November 1980 by the court supervising the USNB receivership (Pet. App. B3), and shortly thereafter Air Florida paid the FDIC $15.4 million (*id.* at A6). On May 26, 1981, the court in the Westgate reorganization proceeding ordered that stock in the reorganized Westgate be distributed to Westgate's creditors (*id.* at B5). The reorganized company's stock was issued to Air Florida and the other creditors shortly thereafter (*ibid.*).[1]

---

[1] The agreement also provided that the purchase price would be adjusted upon sale of a cannery owned by Westgate (Pet. App. A7). Air Florida subsequently assigned its rights under the cannery provision to petitioner InterFirst Bank.

As part of the purchase agreement, Air Florida "promised to make a general public offer for outstanding Westgate common shares at no less than the price it paid the FDIC. If Air Florida acquired more than 80% of Westgate's common stock, and if it paid more per share to tender-offerees than the FDIC received, the FDIC was entitled to additional compensation to afford it the same price per share paid the tender-offerees" (Pet. App. A6). The tender offer was to be made within 425 days after the consummation of Westgate's reorganization (*id.* at B4).

After Air Florida had acquired the receivership's Westgate stock, "Westgate's bankruptcy trustees arranged, and [its reorganization] court approved, the sale of Air California to a third party for $61.5 million. The sale caused a substantial increase in the trading price of outstanding shares of Westgate common stock." Pet. App. A6. After the sale of Air California, Westgate's common shares "traded between $21 and $26.50 per share" (*id.* at A7). At that point (February 1982), Air Florida decided not to make the tender offer required by the agreement (*ibid.*). On April 1, 1982, Westgate's directors announced that Westgate would be liquidated, with shareholders receiving a liquidating dividend of $28.25 per share; the liquidating dividend was paid on May 3, 1982 (*id.* at A7 & n.1).

2. On April 30, 1982, the FDIC as receiver brought suit against Air Florida in the United States District Court for the Southern District of California, claiming that Air Florida had violated the purchase agreement by not making a tender offer; the FDIC sought rescission and restitution (Pet. App. A7). Air Florida counterclaimed for some $2 million it claimed the FDIC owed it under the cannery provision (*ibid.*; see note 1, *supra*). This suit, although independent of the USNB receivership, was transferred pursuant to local rule to the same United States District

Judge (Neilsen, J.) who oversaw the receivership and who in that capacity had approved the purchase agreement. See Minute Order of May 6, 1982.

The district court rejected the FDIC's claim of breach, finding that Air Florida was required to make a tender offer only at the price it had paid to the FDIC and that such an offer would have been pointless, since at all times after the sale of Air California the price of Westgate common stock had been well above the $18 per share the FDIC received (Pet. App. A10-A11, B5-B8). The district court admitted extrinsic evidence offered to prove the intent of the parties, but it held that "the Court's determination of this matter is the same whether the Court considers the admitted parol evidence or interprets the Agreement as a matter of law without the aid of parol evidence" (*id.* at B7).[2]

3. The court of appeals reversed. Reviewing de novo the interpretation of the tender offer provision of the purchase agreement (Pet. App. A8 & n.2), it held that the agreement used the term "tender offer" to refer to a "bona fide attempt to acquire control of a company. At the very least, it is an offer reasonably calculated to persuade shareholders to sell their stock" (*id.* at A12). The court then ruled, "[a]n offer of only the minimum price [of $18], in the face of a higher market price, in our view would not

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[2] The district court also ruled in Air Florida's favor on its counterclaim. It ordered that the amount of the cannery adjustment be determined by the parties, the parties' accountants, or an independent accountant, pursuant to the arbitration procedures set forth in the agreement; the district court initially left its judgment open pending determination of that amount (Pet. App. B9). On October 7, 1985, the district court issued judgment in favor of petitioner InterFirst Bank (Air Florida's assignee), enforcing the arbitrator's award and granting interest to run from the date of that award to the date of payment by the FDIC (*id.* at B11-B12).

be a bona fide tender offer" (*ibid.*). The court rejected petitioners' arguments that other language in the agreement contradicted the court's interpretation (*id.* at A13-A14) and held that certain extrinsic evidence to which petitioners pointed did "nothing to contradict the plain meaning of the agreement or render it ambiguous" (*id.* at A14). The court of appeals remanded the proceeding to the district court to determine whether Air Florida's failure to make the tender offer constituted a "material" breach entitling the FDIC to rescission; the court of appeals said that if the breach was not material the FDIC would be entitled to unspecified restitution or damages (*id.* at A17-A20).[3]

ARGUMENT

The court of appeals' ruling that it could interpret de novo a contract it found unambiguous, and that it was not required to afford special deference to the interpretation reached by a district judge who happened also to have approved the contract in his supervisory capacity over a receivership, is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

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[3] The court of appeals rejected the FDIC's argument that it was excused from complying with the arbitrator's award on the cannery agreement for reasons other than Air Florida's breach of the tender offer provision (Pet. App. A21-A24), but it remanded the cannery provision issue to the district court, stating that if the FDIC were found entitled to rescind the contract it would be excused from the cannery provision; otherwise, the FDIC would have to comply with the arbitrator's award (*id.* at A20-A21), which would be set off against any award of damages to the FDIC as compensation for Air Florida's breach of the tender offer agreement (*id.* at A26). The court of appeals also upheld the district court's award of interest from the date of the arbitrator's decision (*id.* at A21-A26). The FDIC has not sought review of the court of appeals' rulings in favor of petitioners.

1. The court of appeals concluded that the purchase agreement unambiguously required Air Florida to make a tender offer "reasonably calculated to obtain outstanding shares of Westgate" (Pet. App. A14). Petitioners do not ask this Court to review the court of appeals' interpretation of the language of the agreement. Instead, they maintain (Pet. 2-3) that under the circumstances of this case the court of appeals, rather than interpreting the agreement's language for itself, should have deferred to the district court's reading.

Petitioners do not challenge the court of appeals' general approach to contract interpretation. As the court explained, "[t]he meaning of a contractual term and the determination whether such a term is ambiguous are both questions of law subject to de novo review. If ambiguity exists and the district court makes factual findings as to the parties' intent, the court's findings will not be disturbed unless clearly erroneous" (Pet. App. A8 n.2 (citation omitted)). See, *e.g.*, *Pennsylvania Avenue Dev. Corp.* v. *One Parcel of Land in the District of Columbia*, 670 F. 2d 289, 292 (D.C. Cir. 1981); *In re Stevenson Associates, Inc.*, 777 F. 2d 415, 418 (8th Cir. 1985).[4] Here, the court of appeals found the contract unambiguous (Pet. App. A14) and therefore reviewed the district court's conclusions de novo (*id.* at A8 n.2).

Petitioners argue that notwithstanding the general rule, when a contract has been approved by the district judge overseeing a receivership, and the same district judge

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[4] The courts of appeals generally treat interpretation of unambiguous contract language as a question of law, and the weighing of parol evidence of the parties' intent (where resort to such evidence is required) as involving questions of fact. See, *e.g.*, *Southern Natural Gas Co.* v. *Pursue Energy*, 781 F.2d 1079, 1081 (5th Cir. 1986); *Eatmon* v. *Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1518 (11th Cir. 1985). Petitioners cite no authority for a contrary rule.

later has occasion to interpret the contract in a suit arising out of a claimed breach, his interpretation is entitled to special deference from the court of appeals. That contention, which was not made below and is not supported by authority, is plainly wrong. The meaning of a contract depends, under California law, which was the choice of the parties here (see Pet. App. A10), upon the intention of the parties (see *ibid.*), not the intention of the approving judge (as later remembered by him). Judicial approval of a contract does not turn the contract into an order of court or make the approving judge a contracting party whose intention bears on its meaning.

Contrary to petitioners' suggestion (see Pet. 12-16), the application of the usual rule of review in this case does not deprive all receivers' contracts of "certainty or finality" (*id.* at 12). Judge Nielsen did not decide the point at issue here in connection with his approval of the receiver's contract; indeed, he specifically declined Air Florida's request in the receivership proceeding that he rule on the meaning of the tender offer provision (see C.A. Record Excerpts 162-172, 206-208), and he plainly regarded the present point as open for decision on the merits in the present case. The court of appeals was not reviewing the order approving the sale: it was reviewing the district court's interpretation of the contract in the present suit for breach of contract, and the fact that it disagreed with the district court does not foreshadow judicial chaos.

2. Petitioners also argue (Pet. 25) that the court of appeals allowed the FDIC "to build an evidentiary record, lose the case, then urge admission of the evidence as reversible error." That is not in fact what happened.

The FDIC argued in the district court that the agreement was clear in its favor as a matter of law but that, if the court found it ambiguous, extrinsic evidence confirmed the FDIC's interpretation. The district court stated

that its interpretation of the contract was the same whether based purely on the language or on parol evidence (Pet. App. B7), disagreeing with the FDIC on either basis.

In the court of appeals, the FDIC reiterated only its arguments based on the text of the agreement, contending that the text required reversal. The FDIC did not suggest, nor did the court rule, that the district court's judgment should be reversed *because* parol evidence had been admitted. See FDIC C.A. Br. 30-36. The court of appeals simply agreed with the FDIC that the contract unambiguously required Air Florida to attempt to obtain the public's Westgate stock and that the extrinsic evidence did "nothing to contradict the plain meaning of the agreement or render it ambiguous" (Pet. App. A14). Contrary to petitioners' implicit contention, the admission of parol evidence does not bar a court from finding an agreement unambiguous on its face.[5]

3. Finally, we note that the case is in an interlocutory posture. The district court on remand must first decide whether Air Florida's breach caused "a failure of consideration sufficient to be deemed material and thus to warrant rescission" (Pet. App. A18). If the district court finds that rescission is not appropriate, the district court has been instructed to assess a restitutionary or damage award (*id.* at A20), but the court of appeals did not specify the measure of the award. Accordingly, even if the petitioner presented questions meriting review, it would be appropriate to defer any such review pending the further proceedings in the lower courts.

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[5] This is thus not a case like *Computer Systems Engineering, Inc.* v. *Qantel Corp.*, 740 F.2d 59, 64-65 (1st Cir. 1984) (citation omitted), cited in the petition (at 25), in which a party has attempted to " 'invite error' by requesting jury instructions based on a statement of law it would subsequently seek to make a basis for reversal on appeal."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60344

Supreme Court, U.S.
FILED
MAR 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1049

In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

AIR FLORIDA SYSTEM, INC.,
INTERFIRST BANK, DALLAS, N.A.,
Petitioners,

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

PETITIONERS' REPLY MEMORANDUM

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Respondent.

PETITIONERS' REPLY MEMORANDUM

Three arguments raised by the FDIC's Brief in Opposition require Petitioners' reply.*

First, the fact that the District Court decided this matter in a lawsuit which was subsequent to the proceeding in which it approved the receiver's contract (Opposition at 7) only underscores the need to grant certiorari. If in lawsuits *following* a receivership action a subsequent court can void a District Court-approved transaction, even without fraud, mistake or excusable neglect, then the required finality of such sales *will* be eroded, and Congress' directive that the receiver may sell "on such terms as the *court* shall direct", 12 U.S.C. § 192 (emphasis added), will become meaningless.

* Petitioners are corporations. Corporate subsidiaries and affiliates have been listed in the Petition.

Second, the FDIC's argument that Petitioners did not raise below the contention advanced here (Opposition at 7) is misleading. The issue did not arise until the Court of Appeals, in denying Petitioners' Petition for Rehearing, *changed* its opinion to rule entirely as a matter of law, and to disregard the District Court's interpretation of the contract made under its supervision.

Third, awaiting remand before review, as the FDIC suggests (Opposition at 8), will only leave on the books the erroneous and dangerous precedent that contracts made under the District Court's supervisory authority can be overturned even without fraud, mistake or excusable neglect, simply because a later Court interprets the contract differently than did the supervising court. Nothing that happens on remand can change that. In the meantime, numerous bank takeovers and bankruptcy proceedings will occur, and participants need to know that contracts made under the supervisory authority of the District Courts will not be disturbed.

For these reasons, and those set forth in the Petition, Petitioners urge the Court to grant certiorari.

Dated: March 22, 1988

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 22, 1988, I served the within Petitioners' Reply Memorandum in re: "Air Florida System, Inc. vs. Federal Deposit Insurance Corporation" in the United States Supreme Court, October Term 1987, No. 87-1049;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 22, 1988, at Los Angeles, California.

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CE CE MEDINA